THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 439

Revising the Rules of Appellate Procedure to reflect the organization of the Court of Appeals

IT IS ORDERED:

1. The Rules of Appellate Procedure of the State of Alaska, and all amendments thereto, are rescinded.

2. Supreme Court Order No. 14, and all amendments and revisions to that order are rescinded.

3. The attached rules, numbered 101 through 611, are adopted as the Rules of Appellate Procedure.

4. The Rules of Appellate Procedure adopted by this order apply to cases and proceedings filed in the Supreme Court or the Court of Appeals on or after the effective date of this order. They also apply on and after that date to cases and proceedings filed before that date, except to the extent that their application would not be feasible, or would work injustice, in which case the rules rescinded by this order apply, notwithstanding their rescission.

DATED: October 21, 1980

EFFECTIVE DATE: November 15, 1980

Jay A. Rabinowitz
Chief Justice

Roger H. Connor
Justice

Edmond W. Burke
Justice

Justice

Justice

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R E V I S E D

RULES OF APPELLATE PROCEDURE

governing procedure in

THE SUPREME COURT OF ALASKA

and

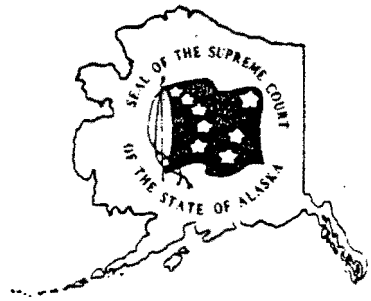
THE COURT OF APPEALS OF ALASKA

Effective November 15, 1980

adopted by

THE SUPREME COURT OF ALASKA

Supreme Court



Court of Appeals

State of Alaska

OFFICE OF THE CLERK
303 "K" STREET
ANCHORAGE, ALASKA
99501
(907) 264-0629

ROBERT D. BACON
Clerk of Courts

PREFACE

Revision of the Rules of Appellate Procedure was made necessary by Chapter 12, SLA 1980, which created the Alaska Court of Appeals and made other changes in the statutes relating to the judiciary. The revised rules, which take effect on November 15, 1980, govern procedure in both the Supreme Court and the Court of Appeals. Part Six of the Rules governs procedure in the Superior Court on appeals to it from the District Court or an administrative agency.

The Rules are accompanied by a commentary prepared by the office of the Clerk of the Appellate Courts. The Supreme Court has not adopted the commentary, but has authorized it to be made available to assist users of the revised rules in understanding the changes which have been made from the prior rules.

Comments and inquiries may be directed to any one of the offices of the Clerk of the Appellate Courts:

303 K Street, Suite 507, Anchorage, AK 99501 264-0629
604 Barnette Street, Suite 418, Fairbanks, AK 99701 452-1559
Pouch U, Juneau, AK 99811 465-3410

DISPOSITION OF FORMER RULES

Former Rule	Revised Rule
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2	102
3	103
4	104
5	202
6	203
7	204
8	205
9	210
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11	212
12	212,503
13	505
14	503
15	513
16	105
17	106
18	213,505
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20	206
20.5	207
21	215
21.5	216
22	none
23	402
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25	404,405

Former Rule	Revised Rule
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28	507
29	508
30	509
31	510
32	511
33	512
34	208
35	209
36	406
37	503
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Chief Justice

Roger H. Connor
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Warren T. Boochever
Justice

Edmond W. Burke
Justice

Alex H. Dimond
Justice

I. Organization of the Appellate Courts

II. Procedure on Appeals as of Right

III. Petitions for Hearing

IV. Petitions for Review, Original Applications, and Other Special Proceedings

V. General Procedures

IV. Superior Court as an Appellate Court

PART ONE. ORGANIZATION OF THE APPELLATE COURTS.

Rule 101. Titles of the Courts; Definitions.

(a) Part One of these rules (Rules 101 through 106) applies to the Supreme Court of the State of Alaska, referred to in these rules as the "Supreme Court," and to the Court of Appeals of the State of Alaska, referred to in these rules as the "Court of Appeals."

(b) As used in these rules, "appellate court" means the Supreme Court or the Court of Appeals. Unless the context clearly indicates otherwise, as used in these rules "justice" means a justice of the Supreme Court, including the Chief Justice, and "judge" means a judge of the Court of Appeals, including the chief judge.

Rule 101 COMMENT:

Successor to former Rule 1. Note that the term "appellate court" is not a synonym for the Court of Appeals, but is a generic term including both appellate courts.

Rule 102. Clerk.

(a) The Clerk of the Appellate Courts, referred to in these rules as the "clerk," is Clerk of the Supreme Court and Clerk of the Court of Appeals.

(b) The principal office of the clerk is located in Anchorage. The clerk shall also maintain offices in Fairbanks and Juneau and at such other locations as the Supreme Court may designate.

(c) The clerk may not practice, either as attorney or counsellor, in any court while he continues to be clerk.

(d) The clerk shall, before entering on the execution of his office, take and subscribe to the oath set forth in section 5, article XII, of the state constitution and such further oaths or affirmations as may be prescribed by the legislature, and shall give bond in the sum to be fixed, and with sureties to be approved by the Supreme Court, faithfully to discharge the duties of his office. The bond shall be deposited for safekeeping as the Supreme Court may direct. The Supreme Court may permit the clerk to be covered under the blanket bond provided in Rule 34 of the Rules Governing the Administration of All Courts, in lieu of giving a separate bond.

(e) The clerk may not permit any original record or paper to be taken from the appellate courts, without an order from the appropriate court, except as otherwise provided in these rules.

(f) The clerk may reject a brief or other paper or document submitted for filing which fails to conform to the requirements of these rules. Upon the rejection of a submittal under the authority of this paragraph, the clerk shall notify the party and, where appropriate, specify the defect and provide a time for the filing of a corrected brief, paper or document.

(g) The clerk is appointed by, and serves at the pleasure of, the Supreme Court. The annual compensation of the clerk is on salary range 25 of the pay plan for classified and partially exempt employees.

(h) The clerk shall prepare, sign and enter all judgments, mandates and orders of the appellate courts unless otherwise directed by the appropriate court.

Rule 102 COMMENT:

This is a derivation of former Rule 2. It provides for a single clerk who shall be clerk of both courts. As this rule is drafted, the Court of Appeals has no authority over the selection of its clerk.

New paragraph (d) is revised to reflect existing practice, that the clerk is covered under the blanket bond covering all court system employees, rather than posting a separate performance bond.

Rule 103. Attorneys and Counsellors.

(a) All attorneys admitted to practice law in the State of Alaska are qualified to practice in the appellate courts.

(b) On motion to either appellate court, other attorneys may be permitted to practice in that court pursuant to Civil Rule 81(a)(2) and (3). The clerk may determine motions filed under this section.

Rule 103 COMMENT:

Former Rule 3 without substantive change.

Rule 104. Clerks to Justices Not to Practice.

No one serving as a law clerk, secretary, or other full-time officer or employee of the appellate courts or of a justice or judge of the appellate courts may engage in the private practice of law while continuing in that position; nor may he ever participate, by way of any form of professional consultation or assistance, in any case which was pending in the court by which he was employed during the period that he held such position.

Rule 104 COMMENT:

Former Rule 4 without substantive change. This rule applies to law externs, summer assistants and other temporary full-time employees as well as law clerks and the permanent staff.

Rule 105. Quorum.

(a) A quorum of the Supreme Court consists of three justices. A quorum of the Court of Appeals consists of two judges.

(b) Pro tempore justices or judges designated pursuant to Rule 106 shall be counted for purposes of a quorum.

(c) If a quorum does not attend on a day on which a session of court is scheduled, any justice or judge who does attend may adjourn the court from time to time, or in the absence of any justice or judge, the clerk may adjourn the court from day to day.

(d) A justice or judge attending when less than a quorum is present may make all necessary orders touching any pending proceeding.

Rule 105 COMMENT:

This rule is derived from former Rule 16. The draft provides that two out of the three judges of the Court of Appeals will be a quorum. This is the same as the federal rule as specified in 28 USC § 46(d). A number of states, including Hawaii and Oregon, require the presence of three judges for a quorum on a court of appeals which hears cases in three-judge panels. The federal rule appears preferable, particularly for a court which has only three judges in total and cannot borrow a member of another panel or one of its own retired judges when necessary. With a quorum of two, the court can hear argument despite the last-minute illness or recusal of one judge. The Court of Appeals could also, if it wished, adopt a practice used in some federal circuits of initially presenting "full-court" motions to two judges, and bringing in a third only if the two disagreed. When the Supreme Court consisted of three justices prior to 1968, two of them constituted a quorum.

Former Rule 16(b), carried forward as subsection (c) of this draft, has been revised to delete the distinction between the absence of a quorum on the "day appointed for holding" "any term or session," and the lack of a quorum "during a term, after a quorum has assembled." This was the only reference in the former Appellate Rules to the outdated concept of a "term" of court. The revised draft provides for the same procedure at any public session of either court attended by fewer than a quorum.

The rule makes explicit that a pro tem justice or judge is counted for purposes of a quorum. E.g., Graham v. North River Ins. Co., 533 P.2d 20 (Alaska 1975) (5 Superior Ct. judges); Bald v. RCA Alascom, 569 P.2d 1328 (Alaska 1977) (2 justices; 1 retired justice); Brown v. Estate of Jonz, 591 P.2d 532 (Alaska 1979) (2 justices; 1 Superior Ct. judge). A pro tem justice or judge may cast the deciding vote. Graham, supra (unanimous decision of 5 pro tem justices); Brown, supra (2-1 decision; majority consisted of 1 justice and 1 pro tem justice).

Rule 106. Justices and Judges Pro Tempore

(a) The Chief Justice of the Supreme Court, or another justice designated by him, may assign one or more District Court, Superior Court or Court of Appeals judges, active or retired, or retired justices of the Supreme Court, to sit as Supreme Court justices pro tempore whenever the business of the Supreme Court requires.

(b) The Chief Justice or his designee may assign one or more District or Superior Court judges or Supreme Court justices, active or retired, or retired judges of the Court of Appeals, to sit as Court of Appeals judges pro tempore whenever the business of the Court of Appeals requires.

Rule 106 COMMENT:

This is a complete rewriting of former Rule 17. It expands the former rule by allowing the Chief Justice to designate District Court judges to sit on either appellate court. See Alaska Constitution, Art. 4, § 16; Oxereok v. State, 611 P.2d 912 (Alaska 1980).

The draft retains the language of the former rule authorizing pro tem appointments whenever the business of the court requires. Appointment of pro tem appellate judges merely to ease the burden on the regular judges, when the regular judges are not disqualified, absent, or ill, might raise constitutional problems, as discussed in Mosk v. Superior Court, 601 P.2d 1030, 1034-39 (Cal. 1979), and Fay v. District Court of Appeal, 254 P. 896 (Cal. 1927). The Fay case held it improper to create a de facto second division of an appellate court, composed entirely of pro tem judges, simply to reduce the number of cases the regular judges must decide.

See also the last paragraph of the comment to Rule 105.

This rule parallels, but does not completely duplicate, new Administrative Rules 23 and 24.

Under paragraph (b), the Chief Justice may delegate to the Chief Judge or another judge of the Court of Appeals, his authority to designate pro tempore judges for the Court of Appeals.

PART TWO. PROCEDURE ON APPEALS AS OF RIGHT

Rule 201. Scope of Part Two.

Part Two of these rules (Rules 201 through 216) applies to appeals as of right, whether to the Court of Appeals under AS 22.07.020 or to the Supreme Court under AS 22.05.010. The "court" or "appellate court" referred to in Part Two of these rules is the Court of Appeals, if the appeal is taken to that court, or the Supreme Court, if the appeal is taken to that court.

The "trial court" referred to in Part Two of these rules is the District Court, if that court entered the judgment being appealed, or the Superior Court, if that court entered the judgment being appealed.

Rule 201 COMMENT:

Part Two of the draft rules deals with procedure on the one appeal as of right, whether that appeal is heard in the Court of Appeals or the Supreme Court. Throughout, the generic term "appellate court" is used to refer to the court hearing the appeal. Part Two of the rules does not cover appeals to the Superior Court; Part Six covers them.

Rule 202. Judgments from Which Appeal May be Taken

(a) An appeal may be taken to the Supreme Court from a final judgment entered by the Superior Court, in the circumstances specified in AS 22.05.010.

(b) An appeal may be taken to the Court of Appeals from a final judgment entered by the Superior Court or the District Court, in the circumstances specified in AS 22.07.020.

(c) In criminal cases, the prosecution has a right to appeal only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

Rule 202 COMMENT:

Former Rule 5, revised to reflect statutory changes. Reference in last paragraph is changed to "prosecution" from "state" to include prosecutions brought by local governments.

Rule 203. Supervision and Control of Proceedings.

The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the trial court, or to modify or vacate any order made by the trial court in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 203 COMMENT:

Former Rule 6 without substantive change.

Rule 204. Appeal: Time--Notice--Bonds.

(a) When Taken--Appeals and Cross-Appeals.

(1) Appeals. The notice of appeal shall be filed within 30 days from the entry of the judgment appealed from.

(2) Subsequent Appeals. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the filing of any timely notice of appeal by any other party, or within 30 days from the entry of the judgment, whichever period expires last.

(3) Motions That Terminate Time for Filing Appeal In Civil Cases. In a civil case, the running of the time for filing an appeal is terminated by a timely motion filed in Superior Court pursuant to those rules of civil procedure enumerated in this section, and the full time for appeal is computed from the entry of any of the following orders made on timely motions:

[a] Granting or denying a motion for judgment under Civil Rule 50(b);

[b] Granting or denying a motion to amend or make additional findings of fact under

Civil Rule 52(b), whether or not an alteration of the judgment would be required if the motion is granted;

[c] Granting or denying a motion to alter or amend a judgment under Civil Rule 59;

[d] Denying a new trial under Civil Rule 59; or

[e] Granting or denying a motion for reconsideration under Civil Rule 77(m).

(4) Motions That Terminate Time for Filing Appeal in Criminal Cases. In a criminal case, if a motion for a new trial or in arrest of judgment or a motion for reduction, correction, or suspension of sentence under Criminal Rule 35 has been made within the 30-day period following entry of the judgment, an appeal from a judgment of conviction may be filed within 30 days after entry of the order deciding the motion.

(5) Effect of Taxing of Costs and Prejudgment Interest.

[a] The running of the time for filing an appeal is not terminated by proceedings related to the taxing of costs pursuant to Civil Rule

79 or while awaiting calculation of prejudgment interest. However, the Statement of Points on Appeal filed pursuant to Appellate Rule 210(e) may be amended by an appellant or cross-appellant to include the subjects of costs and attorney's fees or prejudgment interest and these subjects will thereafter be considered part of the appeal if covered in the brief of appellant or cross-appellant. If no appeal or cross-appeal is pending, the allowance of costs and attorney's fees or the award of prejudgment interest shall be considered a final judgment subject to separate appeal limited to the subject of costs, attorney's fees or prejudgment interest.

[b] Notwithstanding Rule 203, the pendency of an appeal shall not divest the trial court of jurisdiction to consider the matters of costs and attorney's fees pursuant to Civil Rules 79 and 82.

(b) Notice of Appeal.

(1) A party may appeal from a judgment by filing with the court from which the appeal is being taken a notice of appeal in duplicate with sufficient additional copies for all parties. The notice of appeal must specify the parties taking the appeal, designate the judgment or part thereof appealed from,

and name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk of the trial court by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but the clerk's failure to do so does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address. The duplicate notice of appeal shall be forwarded immediately by the clerk of the trial court to the clerk of the appellate court. The duplicate notice of appeal sent to the appellate court shall be accompanied by a copy of the judgment from which the appeal is taken.

(2) Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in these rules, or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(c) Bond on Appeal. Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal in a civil case. The bond shall be in the sum of seven hundred and fifty dollars ($750.00), unless the Superior Court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or such costs as the Supreme Court may award if the judgment is modified. If a bond on appeal in the sum of seven hundred and fifty dollars ($750.00) is given, no approval thereof is necessary. After a bond on appeal is filed, an appellee may by motion raise objection to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the Superior Court. In lieu of filing such cost bond, the appellant may deposit in the office of the clerk of the court from which the appeal is taken a sum of money reasonably sufficient to cover such costs, the amount thereof to be fixed by the Superior Court.

(d) Supersedeas Bond. Whenever in a civil case an appellant entitled thereto desires a stay on appeal, he may present to the Superior Court for its approval a supersedeas

bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full, together with costs and interest, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interest as the Supreme Court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, unless the Superior Court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the court or the state troopers or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the cost of the action, costs on appeal, and interest, unless the Superior Court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. A municipality or an officer or agent

thereof desiring a stay on appeal is exempted from the requirements of posting supersedeas bond imposed by this subsection.

(e) Failure to File or Insufficiency of Bond. If a bond on appeal or a supersedeas bond is not filed with the notice of appeal, or if the bond filed is found insufficient, and if the record on appeal has not been forwarded to the Supreme Court, a bond may be filed at such time before the record is so forwarded as may be fixed by the Superior Court. After the record has been forwarded, application for leave to file a bond may be made only in the Supreme Court.

(f) Judgment Against Surety. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the Superior Court and irrevocably appoints the clerk of that court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the Superior Court prescribed may be served on the clerk of the Superior Court who shall forthwith mail copies to the surety if his address is known.

(g) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order

of a court and their interests are such as to make joinder practical, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

Rule 204 COMMENT:

This rule combines former Rule 7 (civil cases) and 19 (criminal cases). Much of these two rules overlapped, and there seemed to be no purpose in carrying them separately. Appropriate changes have been made to indicate that the requirements of a cost bond and supersedeas bond apply only to civil cases.

One substantive change is in the last sentence: deleting the authority of the parties to stipulate to consolidation of appeals. There may be reasons of judicial administration and efficiency which augur against consolidation, of which the parties might not be aware. Stipulations are permitted in the appellate courts only in extremely limited circumstances, and there appears to be no compelling need for them here. It will ordinarily be an extremely routine matter, requiring a minimal expenditure of judicial time, for a judicial officer to approve an unopposed motion to consolidate appeals.

Other changes in this rule merely change references to the Supreme and Superior Courts to "appellate" and "trial" courts, respectively, as appropriate. See Rule 201.

The last sentence of paragraph (a)(1), relating to administrative agency decisions, is deleted. Since administrative appeals are governed by Part Six of the draft, this provision belongs there, if at all, and seems unnecessary even there.

Rule 204 comment continued:

In paragraph (a)(2), a change has been made to the cross-appeal rule. It provides that a timely cross-appeal may be filed within 14 days after the filing of any notice of appeal, not just within 14 days after the filing of the first notice of appeal. The provision, suggested by attorney Ken Jacobus, relates to multi-party litigation in which a party which would not otherwise appeal might be moved to do so upon learning that some other party has appealed. The change makes a difference in the following circumstances: Party A filed a notice of appeal 10 days after judgment; party B filed on the 27th day; party C receives service of B's notice on the 32nd day and decides, on the basis of B's appeal, that it should also appeal to protect itself. Under the former rule, C would be out of time, since the regular 30-day period and the 14 days after the first notice of appeal have both elapsed. Under the new rule, C would be permitted a reasonable amount of time to appeal after the change in circumstances created by B's appeal.

Civil Rule 77(m), referred to in paragraph (a)(3)[e], was formerly designated 77(n), but was relettered by Supreme Court Order No. 434, effective November 1, 1980.

In paragraph (a)(4), a provision requiring the clerk of the trial court to prepare a notice of appeal for a pro se criminal defendant has been deleted. The provision dates from the time prior to Gideon v. Wainwright and prior to the existence of the Public Defender Agency. It appears in conflict with the general principle that court clerks are not to practice law, and seems particularly inappropriate since the notice of appeal is the simplest part of the appellate process. The former rule did not provide for the clerk to -- and the clerk should not -- prepare a statement of points, designation of record, or appellant's brief. Therefore, it probably did the defendant little good to have the clerk prepare his notice of appeal.

Paragraph (a)(5)[b] is new to the rules but probably is declaratory of previous policy.

The 1979 amendments to Federal Appellate Rule 7 deleted a detailed rule such as paragraph (c), requiring a $250 cost bond on appeal, and substituted a brief provision leaving the necessity, amount, and terms of a cost bond entirely to the discretion of the trial judge. This draft does not make a similar amendment.

Regarding paragraph (d), see the comment to Rule 205 below.

Rule 205. Stays Pending Appeal in Civil Cases.

In a civil case, the Supreme Court or a justice thereof may stay the enforcement or effect of the judgment appealed from or the proceedings in the trial court upon such terms as to bond or other matters as may be proper. A motion for a stay will normally not be considered by the Supreme Court unless application has previously been made to the trial court and has been denied, or has been granted on conditions other than those requested.

Rule 205 COMMENT:

Former Rule 8, rewritten without substantive change.

The Civil Rules Committee has been requested to advise the Supreme Court whether there are inconsistencies among this rule, Rule 204(d), Rule 603(a), and Civil Rules 62 and 80. Upon receipt of their recommendation, the Court will consider whether amendments are appropriate.

Rule 206. Stay of Execution and Release Pending Appeal in Criminal Cases

(a) Stay of Execution.

(1) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending appeal.

(2) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the trial court or by the appellate court upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the trial court or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(3) Probation. An order placing the defendant on probation shall be stayed if an appeal is taken.

(4) Other Sentence. Other terms or conditions of a sentence, including but not limited to the revocation or suspension of a license, may be stayed by the trial court pending appeal upon such terms as the court deems proper. If the trial court does not grant the relief requested, the appellant may renew the motion in the appellate court.

(b) Release Pending Appeal. When an appeal on the merits is pending, an appeal under AS 12.30.030(b) from

an order refusing bail pending appeal or imposing conditions of release pending appeal shall be in the form of a motion filed in the merit appeal. The motion shall comply with Rule 503, and shall contain specific factual information relevant to the factors set forth in AS 12.30.020(c), including but not limited to the following:

(1) The full name of the appellant, the trial court docket number of the case, the offenses of which the appellant was convicted, the date of sentencing, and the complete terms of the sentence.

(2) That application for release pending appeal has been made to the trial court, the reasons given by the trial court for denying the application in whole or in part, and facts and reasons demonstrating why the action of the trial court on the application was erroneous or an abuse of discretion.

(3) A concise statement of the question or questions to be raised on the appeal with a showing that the question or questions were raised in the trial court.

(4) Family: marital status; length of marriage; children, and their ages; other relatives in the area of residence.

(5) Employment and financial circumstances: name of employer at time of arrest and during pre-trial release; type of work; how long so employed; any offer or promise of employment if released pending appeal; assets of the appellant or of relatives or friends relevant to the ability to post money bail.

(6) Health: history of mental illness, alcoholism, or addiction to drugs, if any.

(7) Residence: length of residence in the city or town in which the appellant resided at the time of arrest.

(8) Criminal History: criminal convictions within ten years prior to the present arrest; if the appellant has ever forfeited bail, or had release, probation, or parole revoked, the date, the name and location of the court, and a brief description of the circumstances; whether the present offense was committed while the appellant was on bail or other release or on probation or parole; any other criminal charges pending against the appellant at the time the motion is filed.

(c) The decision of the Court of Appeals on an application under this rule is a "final decision" within the meaning of Rule 302.

Rule 206 COMMENT:

Former Rule 20, moved to a position adjacent to its civil counterpart, former Rule 8. Paragraph (c) is new; there are no substantive changes to former paragraphs (a) & (b).

Paragraph (a)(4) is new. It pertains principally, but not entirely, to court-ordered suspension or revocation of driver's licenses as part of the sentence for a motor vehicle offense. It does not affect statutorily-mandated administrative suspensions of driver's licenses under the "point system". The draft leaves broad discretion with the court to determine, under the particular circumstances of each case, whether a stay is warranted and, if so, whether it should be imposed on conditions.

Rule 207. Appeals Relating to Release Prior to Judgment.

An appeal authorized by AS 12.30.030(b) or AS 12.30.040, relating to the release of a criminal defendant prior to the entry of final judgment, shall be determined promptly. The appeal shall take the form of a motion and shall comply with Rules 206(b) & 503. The appellee may respond as provided in Rule 503(d). The Court of Appeals or a judge thereof may order the release of the appellant pending such an appeal. The decision of the Court of Appeals on such an appeal is a "final decision" within the meaning of Rule 302.

Rule 207 COMMENT:

This is former Rule 20.5, rewritten without substantive change, which was added in 1979 to specify the procedure for appeals from the denial of bail, as opposed to bail pending appeal on the merits. It is being kept next to former Rule 20, which also pertains to bail, although from a strict structural viewpoint it probably belongs in Part Four of the rules concerning review of non-final judgments. It seems that confusion is likely to be minimized, however, if it is retained adjoining the bail-pending-appeal rule.

Only the last sentence is new; it permits a petition for hearing to the Supreme Court on the question of release.

Rule 208. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the Court of Appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be released upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the Court of Appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or release of the prisoner and any recognizance or surety taken, shall govern review in the Court of Appeals and in the Supreme Court unless for special reasons shown to the Court of Appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

Rule 208 COMMENT:

This is Federal Appellate Rule 23. It replaces former Rule 34, which was based on an earlier and less comprehensible version of the federal rule.

Rule 209. Appeals at Public Expense.

(a) Civil Matters.

(1) A party to a civil action in the Superior Court may file in the Superior Court a motion to appeal or to petition for review at public expense. The motion shall be accompanied by:

[a] An affidavit of the party detailing his inability to pay fees and costs or to give security for fees and costs.

[b] An affidavit of the party stating he believes that he is entitled to redress on appeal or on petition for review.

[c] A concise statement of the points on which the party intends to rely in his appeal or petition for review.

(2) The motion shall be considered ex parte. In considering the motion to appeal or petition for review at public expense, the Superior Court shall determine:

[a] The indigence or nonindigence of the party.

[b] Whether any of the proposed points on appeal are frivolous and, if so, the reasons.

(3) If the motion is granted:

[a] The party may proceed without further application to the Supreme Court.

[b] The Superior Court shall specify in the order granting the motion which of the following costs or partial costs are to be covered at public expense:

[1] Filing fees

[2] Transcript fees

[3] Costs of printing briefs

[4] Other costs

[c] The Superior Court shall indicate in the order granting the motion if the case may be considered on an agreed statement of facts or on a designated abbreviated record, or if a full record is required.

[d] Any costs and attorney fees awarded to the appellant or petitioner as a prevailing party in the Supreme Court shall accrue to the state to reimburse it for costs relating to the appeal or petition for review.

(4) If the motion is denied in whole or in part:

[a] The Superior Court shall state in writing the reasons for the denial.

[b] The party who made the original motion has ten days from the entry of the order denying the motion to file with the Supreme Court a motion to appeal or petition for review

at public expense. The motion shall be accompanied by copies of the affidavits and statement of points filed in Superior Court, and by a copy of the reasons given by the Superior Court for its action.

(5) Leave to file at public expense granted by the Superior Court or the Supreme Court may be conditioned on repayment of costs to the state. The conditions may include the imposition of liens in favor of the state on costs, attorney fees and other recoveries awarded to the indigent appellant or petitioner.

(b) Criminal Matters. In criminal matters the trial court shall authorize appeals at public expense on behalf of persons financially unable to pay the costs of appeal in accordance with the rules and decisions of the appellate courts of Alaska and where such appeals are required to be provided by state courts by decisions of the Supreme Court of the United States. Where such appeals are authorized by the trial court the costs which shall be borne by the state shall include those of providing counsel and of preparing a transcript and briefs. Criminal Rule 39 shall be followed in making the determination of financial inability. Counsel appointed to represent the defendant in the trial court

pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon compelling reasons.

(c) Costs. Costs, attorney's fees, damages, and interest may be allowed as in other cases, but the state shall not be liable for any of them.

Rule 209 COMMENT:

This is former Rule 35. The only substantive change is the addition of the first sentence of subsection (a)(2): "The motion shall be considered ex parte."

The draft does not incorporate any of the numerous proposed changes to former Rule 35(b) concerning appeals at public expense in criminal matters. The only changes in paragraph (b) are to insert the generic phrases "trial court" and "appellate court." Whenever a comprehensive review of the entire criminal-appeal-at-public-expense situation has been completed, the appropriate provisions can be substituted for subdivision (b) of this rule.

Rule 210. Record on Appeal.

(a) Designation of Contents of Record on Appeal.

(1) At the time the notice of appeal is filed, the appellant shall also serve upon the appellee and file with the trial court, a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

(2) If the appellant designates nothing other than the material required by subsection (f)(1) of this rule, and the appellee thereafter designates additional material, the parties shall proceed under subsection (b) of this rule as if the appellee were the appellant.

(3) In the absence of an agreement between the parties or an order of the court to the contrary, the appellant shall pay all costs for preparation of the original record and transcript, including the cost of preparation of those portions designated by the appellee. This rule does not govern the payment for copies prepared for the use of the parties or counsel.

(b) Transcript.

(1) If there is to be included in the record on appeal any evidence or proceedings that were stenographically reported or electronically recorded, the appellant shall incorporate in his designation a description in the best practical manner of the particular parts of the evidence or proceedings to be included. At the time of filing the request for the preparation of the transcript, the appellant shall state the type of proceedings and the number of days of trial involved.

(2) The appellant shall ascertain from the clerk of the trial court whether the trial court transcript department has the capability to prepare the transcript in a timely manner. If it does not, the appellant shall contract with an authorized transcribing firm to prepare the transcripts, at a price agreed to between them, within a time which will enable the Clerk of the Trial Court to comply with subsection (g) of this rule. The agreement between the appellant and the authorized transcribing firm shall comply with Rule 36 of the Rules Governing the Administration of All Courts. An authorized transcribing firm shall promptly notify the Clerk of the Trial Court when it has been engaged to prepare a transcript for appeal. Promptly upon receipt of such notice, the Clerk of the Trial Courts shall

comply with Rule 36(b) of the Rules Governing the Administration of All Courts. At the time of filing the original of the transcript with the Clerk of the Trial Courts, the authorized transcribing firm shall also submit a statement of the costs of the transcript, identifying the attorney or party who made payment. If additional payment is made at a later time, the transcribing firm shall promptly notify the Clerk of the Trial Courts. The Clerk of the Trial Courts shall transmit this information to the Clerk of the Appellate Courts.

(3) If the appellant's designation includes only part of the recorded or reported evidence or proceedings, the appellee, in his designation referred to in subdivision (a) of this rule, shall in like manner designate such additional parts thereof as he desires to have added. If it is impractical to describe with precision those portions which the parties desire to have included in the record on appeal, amended or supplemental designations may be filed at the time a transcript has been prepared.

(4) The request for the preparation of a transcript shall be:

[a] In writing;

[b] Served on the other parties to the appeal;

[c] Accompanied by proof of service; and

[d] Filed in duplicate with the Clerk of the Trial Courts.

The duplicate copy shall be forwarded immediately by the Clerk of the Trial Courts to the Clerk of the Appellate Courts.

(5) If a copy of the transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file any additional copies.

(6) Transcripts shall be typewritten on white 8-1/2 x 11 inch paper, bound on the left margin. The pages of all transcripts included in the same record on appeal shall be numbered in a single chronological sequence throughout all volumes. The transcript shall contain an index indicating the names of all witnesses whose testimony is included, and the number of the page on which the direct, cross, redirect and recross examination begins. The index shall also indicate for each exhibit the number of the page or pages on which it was offered and received or rejected. The index, which shall refer

to the number of the volume as well as to the page, shall be cumulative for all volumes and shall be placed in the first volume.

(c) Stipulation as to Record. Instead of serving designations as above provided, the parties by written stipulation filed with the Clerk of the Trial Courts may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(d) Record to be Abbreviated. All matters essential to the decision of the questions presented by the appeal must be included in the record on appeal, and all matters not essential to the decision of such questions shall be omitted; and the appellate court will consider nothing but those parts of the record so designated. For any infraction of this rule, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require, and such costs may be imposed upon offending attorneys or parties. In addition, if any material part of the record, proceedings and evidence is not included in the record on appeal, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require.

(e) Statement of Points. At the time of filing his notice of appeal, the appellant shall serve and file

with his designation a concise statement of the points on which he intends to rely on the appeal. The appellate court will consider nothing but the points so stated. On motion in the appellate court, and for cause, the statement of points may be supplemented subsequent to the filing of the designation of record.

(f) Record to be Prepared by Clerk -- Necessary Parts.

(1) The Clerk of the Trial Courts shall prepare the record on appeal which shall consist of original papers, exhibits and transcript as designated by the parties, and which shall always include, whether or not designated, the following: the material pleadings, without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the referee's or master's report, if any; the opinion, if any; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and the statement by the appellant of the points on which he intends to rely.

(2) In a criminal case, if among the points on appeal is an allegation that the sentence is excessive or too lenient, the record on appeal shall also include, whether or not designated, the material required by Rule 215(g)(1).

(3) If the original of any item to be included in the record on appeal cannot be located or is otherwise unavailable, the clerk may substitute a copy, and shall accompany the record with an affidavit of the clerk or a deputy clerk stating the reasons why the original is not available.

(4) The record on appeal shall be assembled by the clerk in one or more separate parts or volumes, as the clerk may deem convenient, and with each page numbered at the bottom consecutively, in order that convenient and easy reference, by page and volume numbers, may be had to any particular paper or exhibit in the record.

(5) The clerk shall also prepare, sign and attach to the record on appeal a document containing the following: a table of contents which shall list each document and exhibit contained in the record on appeal with corresponding volume and page numbers where each such document may be found; the date upon which

the preparation of the record was completed; and the dates upon and manner in which notice of such completion of the record was given by the clerk and the names of the parties or their attorneys to whom such notice was given.

(6) Promptly upon the completion of the preparation of the record on appeal, the clerk shall give notice thereof in writing to all parties to the judgment and to the Clerk of the Appellate Courts, but the clerk's failure to do so does not relieve any party from serving and filing his brief within the time prescribed in rule 212(a).

(g) Time for Completion of Record

(1) The preparation of the record on appeal shall be completed within 40 days from the date of filing the notice of appeal. After completion, the record shall be retained in the clerk's office for a length of time sufficient to permit the preparation of briefs in accordance with Rule 212, and shall be filed with the appellate court at a time designated by the clerk of that court.

(2) Should an authorized transcribing firm be unable to complete the transcripts in sufficient time to enable the Clerk of the Trial Courts to comply

with this subsection, either the transcribing firm or the appellant shall move the appellate court for an extension of time for completion of the record on appeal. The motion shall comply with Rule 503, shall also be served on the Clerk of the Trial Courts, and shall be considered a routine motion within the meaning of Rule 503(e).

(3) Ultimate responsibility for compliance with the time periods of this subsection shall be with the appellant. Sanctions for non-compliance may be imposed as provided in Rule 204(b)(2).

(h) Power of the Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the trial court or a judge thereof except as provided in subdivision (k) of this rule and in Rule 211, but if any difference arises whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to that court's decision. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative,

may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the Clerk of the Trial Courts. All other questions as to the content and form of the record shall be presented to the appellate court.

(i) Record for Preliminary Hearings in the appellate court. If, prior to the time the complete record on appeal has been prepared as herein provided, a party desires to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the Clerk of the Trial Courts, at the party's request, shall prepare and transmit to the appellate court such portion of the record or proceedings below as is needed for that purpose.

(j) Several Appeals. When more than one appeal is taken to the appellate court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication. The preparation of the record shall be completed within 40 days after the filing of the last notice of appeal.

(k) Appeals When No Stenographic Report or Electronic Recording was Made. In the event no stenographic report or electronic recording of the evidence or proceedings

at a hearing or trial was made, the appellant may prepare a statement of the evidence of proceedings from the best available means, including his recollection, for use instead of a stenographic or electronically recorded transcript. This statement shall be served on the appellee, who may serve objections or proposed amendments, and shall be submitted to the court from which the appeal is being taken for settlement and approval. As settled and approved, the statement shall be included by the clerk of that court in the record on appeal.

(l) Filing Fee. When a notice of appeal is filed, the appellant shall pay to the clerk of the court from which the appeal is taken a filing fee prescribed in Rule 9, Rules Governing the Administration of All Courts.

(m) Transfer of Record on Appeal. If it is impractical for Alaska counsel for a party to prepare his brief because he resides in a city or town other than the one where the record on appeal is situated, the Clerk of the Appellate Courts may direct the transfer of the record for the accommodation of counsel in the preparation of briefs.

Rule 210 COMMENT:

This is former Rule 9. There are few substantive changes.

Paragraph (a)(3) is new to the rules. It incorporates a policy which has been in effect since 1961 by way of an administrative director's bulletin, but is not widely known among the practicing bar.

Paragraph (m) has been revised to reflect a recent change in practice. Ordinarily, the record on appeal is physically transmitted to the appellate court after the filing of the appellee's brief, so that during the briefing process counsel may consult it in the office of the trial court clerk. Former paragraph (m) provided for immediate transfer when counsel was located in a judicial district other than the one in which trial court proceedings were held. Immediate transfer places copies of the record in the appellate court offices in the other two judicial districts (other than the Second District) in addition to the one in which the trial court proceedings were held.

The number of lawyers practicing in the Kenai area is growing rapidly. For administrative reasons, all appeal records from the Third Judicial District are prepared in Anchorage, and retained with the trial court clerk there until they are physically transmitted to the appellate courts. This is inconvenient to Kenai counsel, yet they do not come within the letter of former paragraph (m) because

they are located in the same judicial district as Anchorage. Therefore, we have begun requesting that the trial court clerk transmit a copy of the record -- not the original -- to the trial court clerk -- not counsel -- in Kenai, who will hold the copy and make it available for counsel to consult. When briefing is completed, the Kenai clerk is requested to transmit the copy to one of the appellate court offices, and the original and other copy are sent directly to the appellate court from the trial courts in Anchorage. This procedure has also been used in Bethel, Kodiak, Valdez, and Ketchikan, and can be used in any city or town in Alaska in which there is a trial court clerk. The revised rule expressly permits special transfer arrangements even within the same judicial district.

Paragraph (f)(3) is new, and was requested by trial court clerks. When a portion of the case is on appeal but trial court proceedings are continuing on other portions, as on a Civil Rule 54(b) judgment, it enables the trial court to keep the originals of papers it needs, and to send the appellate court a certified copy. Since copies of records are routinely sent to two of the three offices of the appellate clerk, the appellate courts are used to working with copies rather than originals, so the effect should not be major. The rule is also drafted to cover situations in which, after diligent inquiry, the trial court clerk cannot locate papers designated for the record.

Paragraph (b)(6) is substantially revised and expanded, based on Ninth Circuit Local Rule 4(e). It requires the page numbering of all transcripts in a case in a single chronological sequence. This is present policy, but it is not now included in the rules and violation of the policy by transcribers and trial court clerks is a significant problem. Where numerous volumes of transcript each begin with page 1, the job of counsel and the appellate court is unnecessarily made more difficult.

Rule 211. Record on Agreed Statement.

When the questions presented by an appeal can be determined without an examination of all the pleadings, evidence and proceedings in the trial court, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it together with such additions as the trial court may consider necesssary to fully present the questions raised by the appeal, shall be approved by the trial court and shall then be certified to the appellate court as the record on appeal.

Rule 211 COMMENT:

Former Rule 10, without substantive change. This procedure, which has the potential to save substantial amounts of time and money, is almost never used and it might be useful to consider ways of encouraging its use.

Rule 212. Briefs.

(a) Serving and Filing Briefs.

(1) Time for Serving and Filing Briefs. The appellant shall serve and file his brief within 30 days after notice of certification of the record has been served. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 20 days after service of the brief of the appellee. At the time a brief is filed with the appellate court, it must be accompanied by proof of service on all parties.

(2) Number of Copies. A single copy of each brief accompanied by proof of service must be filed with the clerk on or before the date the brief is due. Except as provided in (a)(3) of this rule, the brief will be reviewed and returned to counsel for duplication and binding. Within ten days thereafter, 20 copies of each duplicated brief in civil appeals must be filed with the clerk and two copies shall be served on each party. Except as provided in (a)(3) of this rule, 28 copies of each duplicated brief in criminal cases must be filed with the clerk and two copies shall be served on each party.

(3) Briefs of State and Appeals at Public Expense. Briefs filed by the State of Alaska, the Public Defender, or in an appeal taken at public expense under Rule 209 may be submitted to the clerk for duplication at public expense.

(b) Form.

Briefs may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on opaque, unglazed white paper. Carbon copies of briefs may not be submitted without permission of the court. All printed matter must appear in at least 11 point type, 10 pitch (10 characters per inch). Briefs shall be bound in volumes having pages not exceeding 8 1/2 x 11 inches and type matter not exceeding 6 1/2 x 9 1/2 inches, with double spacing between each line of text. The pages shall be numbered consecutively at the bottom center of the page. The cover of the brief of appellant shall be ivory; that of appellee, blue; that of reply brief, green; and that of an intervenor or amicus curiae, red. The front covers of the briefs shall contain (1) the name of the court and the number of the case; (2) the title of the case; (3) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of court or agency below; (4) title of the document (e.g., Brief of Appellant); and (5) the names

and addresses of counsel representing the party on whose behalf the brief is filed.

(c) Substantive Requirements.

(1) Brief of Appellant. The brief of the appellant shall contain the following items under appropriate headings and in the order here indicated:

[a] A table of contents, including the titles and subtitles of all arguments, with page references.

[b] A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where they are cited.

[c] The constitutional provisions, statutes, court rules, ordinances, and regulations principally relied upon, set out verbatim or their pertinent provisions appropriately summarized.

[d] A jurisdictional statement of the date on which judgment was entered and of the legal authority of the appellate court to consider the appeal.

[e] A list of all parties to the case, without using "et al." or any similar indication, unless the caption of the case on the cover of

the brief contains the names of all parties. This list may be contained in a footnote.

[f] A statement of the issues presented for review. In cases of cross-appeal the cross-appellant may present a statement of the issues presented for review which would require determination if the case is to be reversed and remanded for further proceedings in the trial court. In the event that the decision is affirmed on the appeal, such issues on the cross-appeal may be deemed waived by the appellate court.

[g] A statement of the case. The statement shall first contain a statement of the facts relevant to the issues presented for review with appropriate references to the record (see paragraph (8)). There shall follow a concise statement of the course of proceedings in, and the decision of, the trial court.

[h] Argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. Each major

contention shall be preceded by a heading indicating the subject matter. (See paragraph (8) of this subsection concerning references to the record.)

[i] A short conclusion stating the precise relief sought.

(2) Brief of Appellee. The brief of the appellee shall conform to the requirements of subdivisions (1)[a] through (1)[i], except that a statement of jurisdiction, the issues or the case need not be made unless the appellee is dissatisfied with the statement of the appellant, and a list of all parties need not be included.

(3) Reply Brief. The appellant may file a brief in reply to the brief of the appellee. This brief may raise no contentions not previously raised in either the appellant's or appellee's briefs. If the appellee has cross-appealed and has not filed a single brief under (c)(6) of this rule, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the court.

(4) Length. Exclusive of appendices, the appellant's and appellee's briefs may not exceed 50 numbered pages each. Numbered pages for purposes of

this paragraph begin with the jurisdictional statement required by (c)(1)[d] of this rule. The appellant's reply brief may not exceed 20 pages. A motion for leave to file a brief longer than permitted by this paragraph must be accompanied by a copy of the over-length brief proposed to be filed.

(5) Briefs in Cases of Multiple Parties. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another.

(6) Briefs in Cases Involving Cross-Appeals.

[a] Cross-Appellant. An appellee who is also a cross-appellant may elect to file a single brief that both discusses his claims of error and answers the original appellant. Such a single brief shall be filed on the date the appellee's brief is due. It shall be divided into two sections: the first section shall contain the issues and arguments involved in the cross-appeal and shall be prepared in accordance with (c)(1) of this rule; the second section shall contain the answer to the brief of the appellant and shall

be prepared in accordance with (c)(2) of this rule. If the cross-appellant elects to file a single brief, the right to file a reply brief to the answer to the cross-appeal is waived. If the cross-appellant does not elect to file a single brief, the schedule and form for filing briefs in the cross-appeal shall be in accordance with the procedures for an original appeal.

[b] Cross-Appellee. If the cross-appellant files a single brief, appellant, as cross-appellee, may reply thereto in a separate section of his reply brief. This combined brief may not exceed 50 numbered pages.

(7) References in Briefs and in Oral Arguments to Parties. In briefs and oral arguments, counsel are expected to minimize references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the trial court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," the "injured person," "the taxpayer," and so forth.

(8) References in Briefs to the Record. The briefs shall refer to specific pages of the record.

If reference is made to evidence of which the admissibility is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected. The brief of appellant shall indicate the pages of the record where each point on appeal was raised in the trial court. If the point on appeal was not raised in the trial court, the brief shall so indicate and shall include an explanation of the reasons for raising the point on appeal for the first time in the appellate court. Failure to comply with the requirements of this paragraph may result in return of the brief as provided in paragraph (11) of this subdivision.

(9) Brief of an Amicus Curiae. A brief of an amicus curiae may be filed only if accompanied by written consent of all the parties, or by leave of the appellate court granted on motion, or at the request of the appellate court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Unless all parties otherwise consent, any amicus curiae shall file its brief within the time allowed to the party whose position as to affirmance or

reversal the amicus brief will support, unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. The brief shall be in the form prescribed by this rule and shall be duplicated and served by the clerk, unless otherwise ordered. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

(10) Failure to File Briefs. When the brief for appellant is not filed as required, the court may forthwith, on its own motion or on motion of appellee, take appropriate action, which may include dismissal of the appeal. The authority to dismiss an appeal under this section may be exercised by the clerk of court. When the appellee's brief is not filed as required, appellee will not be heard at oral argument except on consent of his adversary, or by request of the court.

(11) Defective Briefs. When a brief fails to comply with the requirements of these rules, the appellate court, on application of any party or on its own motion, and with or without notice as it may determine appropriate, may:

[a] Order the brief to be returned to counsel for correction by interlineation, cancellation, revisions or replacement in whole or in part, and to be refiled with the clerk within a time specified in the order; or

[b] Order the brief stricken from the files, with leave to file a new brief within a specified time; or

[c] Disregard defects and consider the brief as if it were properly prepared.

The authority to return briefs under this section may be exercised by the clerk of court pursuant to Rule 102(f).

(12) Citation of Supplemental Authorities. When pertinent authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, the party may promptly advise the clerk of the court, by letter, with a copy to adversary counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall contain no argument or explanations. Any response shall be made promptly and shall be similarly limited.

Rule 212 COMMENT:

Subsection (a) of this draft rule is former Rule 11(a). The detailed stylistic requirements of Supreme Court Order No. 14 as most recently amended, are omitted. The order adopting the revised rules rescinds Supreme Court Order No. 14 and all of its numerous amendments. Order No. 14 applied only to briefs printed at public expense under the supervision of the clerk. The most important requirements -- adequate type size, adequate margins, black image on opaque and unglazed white paper -- are in former Rule 12(a), carried forward in subsection (b) of this draft, which applies to all briefs. The common use in law offices of high-grade, second- and third-generation electric and electronic typewriters with carbon ribbons has eliminated most of the problems, such as smudges and erasures, to which Order No. 14 was directed.

Subsection (b) of the draft is former Rule 12(a), revised only to delete references to "appendices," a reference which was apparently taken from the federal appellate rules, which require that multiple copies of certain documents in the record be printed as an appendix to the brief.

Subsection (c) of this draft rule is former Rule 11(b). There are a few substantive changes. In paragraph (1)[g], the order of the statement of the case is reversed, to require a statement of facts first, followed by a statement of the course of proceedings in the trial court. Since this is usually the chronological approach, it is the most natural and logical one, and briefs are frequently filed in

that manner at the present time even though the former rule requires the statement of the course of proceedings in the trial court to precede the statement of facts. A change in paragraph (2) would permit the appellee to omit a statement of jurisdiction if he believes that the appellant's statement of jurisdiction is correct and if he does not challenge the jurisdiction of the appellate court. Similar provision has been made in the former rules for the appellee to omit a statement of issues and facts if he did not disagree with the one prepared by the appellant.

In paragraph (1)[c], it is made explicit that court rules, as well as statutes, etc., principally relied upon in the brief must be set out in full. This amendment is probably declaratory of previous unstated intent.

Paragraph (12), concerning supplemental authority letters, is changed to conform to its source, D.C. Circuit Local Rule 8(g). The former rule stated that the letter "shall without argument state the reasons for the supplemental citations." While most counsel have been suitably restrained and kept the letters short and to the point, a few cases have prompted exchanges of lengthy and argumentative letters of questionable value. The difference between permitted "reasons" and forbidden "argument" is not entirely obvious, so the draft, following the D.C. Circuit rule, says the letter "shall contain no argument or explanations." The former rule corresponds to Federal Appellate Rule 28(j).

Paragraph (1)[e] is new. It requires the appellant's brief to contain a list of all the parties to the case, without using "et al." or any equivalent, if the caption does not list all the parties. This is based on U.S. Supreme Court Rule 21.1(b) and Justice Boochever's recent suggestion.

Rule 213. Oral Argument

(a) Either party may serve and file a written request for oral argument not later than 10 days after the date on which appellant's reply brief is due pursuant to Rule 212(a)(1), or pursuant to any extension of that time granted under Rule 502 or 503. If oral argument is timely requested, it will automatically be scheduled. When a request is made by one party, the right to oral argument extends to all parties. Oral argument shall be scheduled and held as provided in Rule 505.

(b) Opening and Conclusion. The original appellant shall be entitled to open and conclude the argument of the case. When there is a cross-appeal, the appeal and cross-appeal shall be argued together. In such cases the order of oral argument shall be determined by the court at the request of either party or upon its own motion.

Rule 213 COMMENT:

Former Rule 18(a) and (b), rewritten. General provisions regarding oral argument are in draft Rule 505, in Part Five, since they apply to both appeal by right and discretionary review.

Rule 214. Disposition of Appeals.

(a) The court may determine that an appeal shall be disposed of by summary order and without formal written opinion. To assist the court in making this determination, the parties may request in writing that an appeal be so decided. The request shall be signed by all parties and may be filed any time after the filing of the notice of appeal.

(b) In a criminal case, a summary order under this rule shall contain, at a minimum, a statement of the issues considered by the appellate court. This statement of issues may be made by reference to a trial court opinion. For purposes of this rule, "criminal case" includes all collateral criminal proceedings listed in AS 22.07.020(a).

(c) Nothing in this rule limits the right of the parties to oral argument pursuant to Rule 213.

(d) Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state.

Rule 214 COMMENT:

This rule replaces former Rule 26. The only substantive change is the addition of paragraph (b), which has appeared in the Supreme Court Internal Operating Procedures, but not in the rules. The reference to AS 22.07.020(a) is to the Court of Appeals jurisdictional statute, and includes "criminal prosecution, post-conviction relief, children's court matters under AS 47.10.010(a)(1) including waiver of children's court jurisdiction over a minor under AS 47.10, extradition, habeas corpus, probation and parole, and bail."

Rule 215. Sentence Appeal.

(a) Notification of Right to Appeal Sentence. At the time of imposition of any sentence of imprisonment of 45 days or more, the judge shall inform the defendant as follows:

(1) That the sentence may be appealed on the ground that it is excessive.

(2) That upon such appeal the appellate court may reduce or increase the sentence, and that by appealing the sentence under this rule, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.

(3) That if the defendant wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent him on the appeal.

(b) Notice of Appeal. Written notice of appeal from a sentence by the state, or by a defendant appealing solely on the ground that the sentence is excessive, shall be filed with the clerk of the court which imposed the sentence not later than 30 days after sentence was imposed. The notice of appeal need only state that the sentence which is being appealed is too lenient or excessive. No fee shall be collected for filing a notice of sentence appeal.

(c) Termination of Appeal. Any appeal of a sentence initiated by the defendant may be terminated by his filing within 30 days from the filing of the notice of appeal a notice of intent to terminate the appeal. Such a termination shall prevent any increase in the sentence or sentences imposed.

(d) Indigent's Right to Counsel on Sentence Appeal. An indigent defendant is entitled to the assistance of counsel in prosecuting an appeal on the ground that the sentence is excessive. Where an appeal is taken by the state pursuant to AS 12.55.120(b) on the ground that the sentence is too lenient, and the defendant has not appealed, the appellate court in its discretion may appoint counsel for an indigent defendant.

(e) Forwarding Notice of Appeal. Upon receipt of a notice of sentence appeal, the clerk shall forthwith forward a copy of the notice to the defendant and his counsel, to the district attorney, to the judge who imposed the sentence, and to the Clerk of the Appellate Court. The copy of the notice sent to the appellate court shall be accompanied by a copy of the judgment as required by Rule 204(b).

(f) Sentencing Report. The trial court shall prepare a sentencing report as part of the record, which shall include the following:

(1) A verbatim record of the sentencing hearing, including statements made by witnesses, the prosecuting attorney, the defense attorney, and the defendant.

(2) The reasons for selecting the particular sentence imposed.

(3) Specific findings on all material issues of fact and on all factual questions required as a prerequisite to the selection of the sentence imposed.

(4) A precise statement of the terms of the sentence imposed and the purpose the sentence is intended to serve.

(g) Record on Appeal.

(1) Preparation and Contents. Within 15 days after the filing of a notice of sentence appeal, the clerk shall prepare sufficient copies of the record on appeal, which shall consist of the following:

[a] A transcript of the entire sentencing proceeding, which shall include the complete sentencing report required by subdivision (f) of this rule.

[b] All reports and documents which were available to the sentencing court as an aid in imposing sentence.

The clerk shall number the pages of the record consecutively in the same manner as required by Rule 210(f)(4). The 15-day period may be extended as provided in Rule 210(g).

(2) Distribution. Immediately upon preparation of the record on appeal, the clerk shall send copies by mail to the defendant and his counsel, the district attorney, and to the clerk of the appellate courts.

(h) Memoranda on Appeal.

(1) By Appellant. Within 15 days after service of copies of the record on appeal provided for in (g) of this rule, the appellant shall file with the appellate court the original of a typewritten memorandum in support of the appeal.

(2) By Appellee. Within 15 days after service of a copy of appellant's memorandum, the appellee may file with the appellate court the original of a typewritten memorandum in opposition to the appeal.

(3) Reply Memorandum. No reply memorandum shall be filed unless ordered by the court.

(4) Form and Contents of Memoranda. The memoranda filed by either the appellant or the appellee

need not comply with the requirements of Appellate Rule 212 unless ordered by the appellate court.

(5) Duplication and Service of Memoranda. The clerk of the appellate courts shall forthwith reproduce and serve upon opposing counsel a copy of each memorandum.

(i) Disposition of Appeals by Reviewing Court. Sentence appeals will be disposed of by the appellate court on the record. Oral argument may be granted in the court's discretion.

(j) Bail Pending Appeal. A sentence appealed on the sole ground that the sentence is excessive does not confer or enlarge the right to bail pending appeal.

(k) Consolidation of Sentence Appeals with Regular Appeals. An appeal of a sentence on the ground that the sentence is excessive or too lenient shall be consolidated with an appeal by the same party based upon other grounds. Upon consolidation, the procedure for perfecting an appeal on other grounds shall govern.

Rule 215 COMMENT:

Former Rule 21. The only substantive revision is to specify a 15-day period for completion of the record, rather than "immediately." The average is now approximately 10-15 days.

Paragraph (h) has been revised to delete references to the receipt of one document by counsel as beginning the time period for the filing of another. Since the clerk's office is not aware of the date of receipt, this is not an appropriate point to begin the calculation, and the date of service has been substituted.

The legislature changed the introductory provisions of this rule by sections 8, 15, 29, 31, 37 and 38 of Chapter 12, SLA 1980, to provide that certain sentences of short duration cannot be appealed as excessive. Wharton v. State, 590 P.2d 427 (Alaska 1979), indicates that the legislature does not have authority to do so. Therefore, the former provisions are carried forward unchanged.

Rule 216. Expedited Appeals.

(a) Scope. This rule applies to the following classes of appeals, and supersedes the other Appellate Rules to the extent that they may be inconsistent with this rule:

(1) extradition appeals;

(2) juvenile waiver appeals.

(b) Definitions.

(1) An appeal from an order of the Superior Court granting or denying an application for a writ of habeas corpus filed under AS 12.70.090 by a person arrested on a governor's warrant under the Uniform Criminal Extradition Act, is an "extradition appeal." An appeal from any other final judgment of the Superior Court relating to the extradition of a person charged in this state or elsewhere with a crime is also an "extradition appeal," except that any appeal from a final judgment convicting a person of a crime is not an "extradition appeal."

(2) A "juvenile waiver appeal" is an appeal from an order under AS 47.10.060(a) finding that a minor is not amenable to treatment under AS 47.10.

(c) Jurisdictional Limitation. This rule does not permit an appeal to be taken in any circumstances in which an appeal would not be permitted by Rule 202.

(d) Notice of Appeal. The notice of appeal in an appeal under this rule shall be filed with the clerk of the

court which entered the order or judgment being appealed, within ten days after entry of the order or judgment.

The notice shall identify the appeal as an appeal under this rule, but the Court of Appeals will apply this rule to cases within its scope whether they are so identified or not.

(e) Forwarding Notice of Appeal. Immediately upon the filing of a notice of appeal in an appeal under this rule, the Clerk of the Trial Courts shall notify the parties and the Clerk of the Appellate Courts in the manner provided in Rule 204(b).

(f) Record on Appeal. The appellant shall not designate a record on appeal. The entire Superior Court file shall serve as the record on appeal, together with a cassette tape recording of any hearing held in Superior Court if deemed necessary by the Court of Appeals. Promptly upon the filing of the appellee's memorandum, the clerk of the Trial Courts shall transmit the original and copies of the record on appeal to the Clerk of the Appellate Courts in the same manner as for other appeals.

(g) Memoranda on Appeal.

(1) Within 10 days after filing a notice of appeal in an appeal under this rule, the appellant shall file with the Court of Appeals the original of

a typewritten memorandum in support of the appeal, together with proof of service on all other parties.

(2) Within 10 days after service of the appellant's memorandum, the appellee may file with the Court of Appeals the original of a typewritten memorandum in opposition to the appeal.

(3) No reply memorandum may be filed unless ordered by the court.

(4) The memoranda need not comply with the requirements of Rule 212 unless ordered by the Court of Appeals.

(5) The Clerk of the Appellate Courts shall forthwith duplicate copies of the memoranda for use of the court.

(h) Disposition of Appeals. Appeals under this rule will be disposed of expeditiously by the Court of Appeals on the record and memoranda. Oral argument may be granted in the court's discretion.

Rule 216 COMMENT:

Former Rule 21.5, without substantive change. Paragraph (b)(1) is revised to make its scope clear on its face without reference to the cited statute. With respect to paragraph (b)(2), if the juvenile court denies waiver, this is not a final judgment and the prosecution must petition for review, rather than appealing. Since the petition for review process is inherently more expeditious than an appeal, this situation is not included under this rule.

PART THREE. PETITION FOR HEARING

Rule 301. Scope of Part Three.

(a) Part Three of these Rules (Rules 301 through 305) applies to requests to the Supreme Court to exercise its discretionary jurisdiction provided in AS 22.05.010(d) to review decisions of the Court of Appeals.

(b) Part Three also applies to requests to the Supreme Court to exercise its discretionary jurisdiction provided in AS 22.05.010(d) to review decisions of the Superior Court in appeals from the District Court.

(c) Part Three also applies to requests to the Court of Appeals to exercise its discretionary jurisdiction provided in AS 22.07.020(e) to review decisions of the Superior Court in appeals from the District Court.

Rule 301 COMMENT:

Part Three contains the rules required to be adopted by AS 22.07.030.

Rule 302. Petition for Hearing--When Permitted

(a) From the Court of Appeals.

(1) A petition for hearing may be filed in the Supreme Court with respect to any final decision of the Court of Appeals, as defined in AS 22.07.030. "Final decision" includes any decision or order of the Court of Appeals, other than a dismissal by consent of all parties, which closes a matter in the Court of Appeals, whether or not it contemplates further proceedings in a trial court. Unless specified otherwise in the particular order in question, it includes but is not limited to, opinions, memorandum opinion and judgments, orders denying petitions for review, orders denying petitions for hearing filed under AS 22.07.020(e), dismissals on motion of the appellee or respondent, and sua sponte dismissals pursuant to Rule 204(b)(2), 212(c)(10), or another rule.

(2) When a petition for hearing is filed under this subsection, for purposes of Part Three the Supreme Court is the "court of discretionary review," the Court of Appeals is the "intermediate appellate court," and the court which entered the judgment which was appealed to the intermediate appellate court is the "trial court."

(b) From the Superior Court.

(1) A petition for hearing may be filed in the appellate court having statutory jurisdiction, with respect to any final decision of the Superior Court on an appeal from the District Court. "Final decision" is defined in AS 22.07.020(e) and includes any decision or order of the Superior Court, other than a dismissal by consent of all parties, which closes the matter in the Superior Court, whether or not it contemplates further proceedings in the District Court. Unless specified otherwise in the particular order in question, it includes but is not limited to, opinions, memorandum opinion and judgments, orders denying petitions for review, dismissals on motion of the appellee or respondent, and sua sponte dismissals pursuant to Rule 204(b)(2), 212(c)(10), or another rule.

(2) When a petition for hearing is filed under this subsection, for purposes of Part Three the court in which the petition is filed in the "court of discretionary review," the Superior Court is the "intermediate appellate court," and the District Court is the "trial court."

Rule 302 COMMENT:

This rule restates the broad definition of "final decision" included in AS 22.07.030. Discretionary review may be sought from any decision which closes a matter in the immediately lower court, even if it remands the case to a trial court or an administrative agency. This also includes an order denying the petition for review and a dismissal other than one consented to by the party filing the petition for hearing. This is comparable, but not identical, to the broad spectrum of U.S. Court of Appeals decisions which may be the subject of a certiorari petition. Stern & Gressman, 5th ed., page 53. It is to be contrasted sharply with the strict definition of a final judgment from which an appeal by right may be taken. City and Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979).

The rule does not follow the practice in some states, that prior to filing a petition for hearing, a petition for rehearing in the Court of Appeals is mandatory. E.g., Ariz. Rev. Stat. 12-120.24; Colo. Rev. Stat. 13-4-108; Wash. R. App. P. 12.4. Since a petition for rehearing in the Court of Appeals is addressed to the case-deciding appellate function and the specific facts of the particular case, while a petition for hearing in the Supreme Court invokes the lawmaking function and the broader significance of the legal principles (see draft Rule 303(b)(4)), there does not seem to be any particular justification for this requirement.

The draft adopts the term "petition for hearing" for a request that an appellate court give discretionary review to a case which has already had an appeal as of right. This is the term used in California and a number of other states. The other obvious possibilities -- "petition for review," "petition for rehearing," and "petition for certiorari" -- all have a different established meaning. Using any one of them to describe this new animal would therefore probably cause excess confusion. The "hearing" sought will ordinarily include an oral hearing. See Rule 305 infra.

Rule 303. Procedure on Petition for Hearing.

(a) Filing.

(1) The petition for hearing shall be filed within 15 days after entry of the opinion, order, or memorandum opinion and judgment of the intermediate appellate court. The original alone shall be filed, together with proof of service.

(2) If a timely petition for rehearing is filed in the intermediate appellate court the full 15-day period for filing a petition for hearing begins to run upon entry of the final order of the intermediate appellate court resolving the matter on rehearing. Any petition for hearing filed prior to that time will not be entertained.

(b) Format, Length and Contents. The petition for hearing shall be in the format prescribed for motions under Rule 503(b), shall not exceed fifteen pages in length, excluding the decision of the intermediate appellate court, and shall contain in the following order:

(1) A prayer for review;

(2) A short statement of facts relevant to the appeal, but facts correctly stated in the opinion of the intermediate appellate court should not be restated;

(3) A statement of the points relied on for reversal of the decision of the intermediate appellate court, including appropriate authorities;

(4) A statement of concrete reasons, apart from those asserted for reversal, explaining why the issues presented have importance beyond the particular case and require decision by the court of discretionary review, and referring to specific paragraphs of Rule 304; and

(5) A complete copy of the opinion, memorandum opinion and judgment, or order of the intermediate appellate court.

The caption of the petition for hearing shall identify and align the parties in the same manner as in the intermediate appellate court. The first paragraph of the petition shall clearly identify the party or parties filing the petition. No fee shall be collected by the clerk for filing a petition for hearing.

(c) Response. Within 15 days after service, any other party to the proceeding in the intermediate appellate court may file a response. The response shall not exceed fifteen pages in length. Motions to dismiss a petition for hearing will not be received; all objections to exercise of the discretionary power shall be contained in the response. The party filing a petition for hearing may not file a reply to the response without leave of the court of discretionary review. Consideration of the petition for hearing will not

be delayed on account of the filing of a motion for leave to file a reply. Oral argument will not be held on the question whether a petition for hearing should be granted.

(d) Extensions of Time. The time periods in this rule may be extended only by the court of discretionary review or a justice or judge thereof. They may not be extended by the intermediate appellate court or a judge thereof, or by the clerk. Motions for extensions of time shall comply with Rule 503.

(e) Petition for Rehearing. A petition for rehearing may not be filed in connection with the grant or the denial of a petition for hearing.

Rule 303 COMMENT:

Paragraph (a) provides 15 days in which to file a petition for hearing. Practice in other states varies from 10 to 45 days. (Since this 15-day period, like the 10-day period for filing a petition for rehearing, runs from entry of the opinion or order, not service, it is not enlarged by three days for mailing.) As discussed more fully in the next paragraph of this rule, the petition for hearing, if it is to serve its function, must be more than a rehash of the appellate brief, and allowing a little more time at least increases the chances of additional reflection. The time can be extended, but only by a Supreme Court justice, not the clerk. Paragraph (d).

The draft provides a full 15-day period after the denial of rehearing in the court of appeals for a petition for hearing of the underlying Court of Appeals decision on the merits. (This is the same as the provision for appeals from trial court judgments. Rule 204(a)(3)[e].) To police this requirement, the draft provides that a petition for hearing filed while a petition for rehearing is pending or before one is actually filed, will not be considered, because the posture of the case may change by virtue of the proceedings on rehearing. (This conforms to the federal

requirement concerning appeals from a trial court judgment when post-judgment motions are pending, Federal Appellate Rule 4(a)(4). Alaska procedure on trial court judgments is to the contrary; premature notices of appeal are accepted and processed in the usual way if the posture of the case does not in fact change by the time the case is ready for appeal.)

Paragraph (b) of the draft provides a petition for hearing document that is quite similar to a petition for review, in format, length and contents. The list of items to be included is taken from Oregon Appellate Rule 10.05.

Paragraph (c) allows 15 days for filing of a response to a petition for hearing, the same length of time that is allowed for the petition itself. However, since this period of time is measured from service, it is extended by three days for mailing. The remainder of paragraph (c) corresponds to the petition for review rule. Many states provide a shorter time for the response than for the petition. E.g., Hawaii (10 days for petition, 5 days for response) (Sup. Ct. Rule 32); Kansas (30 days for petition, 10 days for response) (App. Rule 8.03(a)); Wisconsin (same as Kansas) (App. Rule 809.62). Allowing an equal period seems fair and corresponds to the practice on petitions for review and briefs.

When a petition for hearing is filed in or granted by the Supreme Court, the case will retain the same caption

and docket number as in the Court of Appeals. Even if the Court of Appeals reversed the trial court and so the former appellee is now the petitioner, the caption will not be turned upside down yet again. Likewise, since it is the continuation of the same appellate case, no new filing fee will be collected. With the exception of the filing fee, this is the same as the present practice for appeals from the District Court to the Superior Court. They retain the same caption and docket number, even if the former defendant is the appellant. A filing fee of $15 is collected, however. (This fee will continue to be collected for appeals from the District Court to the Superior Court, so every appeal as of right except state-expense will continue to be subject to a filing fee.)

Rule 304. Grounds for Granting Petition for Hearing.

The granting of a petition for hearing is not a matter of right, but is within the discretion of the court of discretionary review. The following, while neither controlling nor fully measuring that court's discretion, indicates the character of reasons which will be considered:

(a) The decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the Supreme Court of the State of Alaska, or with another decision of the Court of Appeals.

(b) The intermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has not previously been decided by the Supreme Court of the United States or the Supreme Court of the State of Alaska.

(c) The intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the Supreme Court of the State of Alaska.

(d) Under the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice.

Rule 304 COMMENT:

The suggested grounds for granting a petition for hearing, while similar to those in use in other states and the federal system, are not patterned strictly or principally upon the rules of any one jurisdiction. They cover the usual bases for discretionary appellate review: conflict with controlling decisions; constitutional interpretation; issues of first impression; and issues having substantial impact beyond the immediate parties and facts. The introductory language is taken nearly verbatim from U.S. Supreme Court Rule 17.1, where it introduces a substantially different list of criteria.

The draft does not provide a time limit for the Supreme Court to decide a petition for hearing. This follows the practice in a majority of states and in the U.S. Supreme Court. A few states provide that a petition for hearing is automatically denied if it is not granted within a limited period, usually thirty days. E.g., Calif. Rule of Court 28(e); Iowa Code 684.4; N.M. R. Civ. App. P. 28(e); N.M. R. Cr. App. P. 503(e). In some states, the Supreme Court can extend this period, although not indefinitely. E.g., Calif. Rule of Court 28(a)(extension of 60 additional days allowed). Most or all states with this limited-time requirement have Supreme Courts under one roof which confer regularly, usually weekly, on pending petitions for hearing.

Rule 305. Procedure When Hearing Granted

(a) Unless the order granting a hearing specifies to the contrary, no new briefs may be filed in the court of discretionary review. The court of discretionary review will consider and decide the case on the basis of the briefs filed in the intermediate appellate court. Within 15 days after service of the order granting a hearing, the parties shall submit to the clerk for the use of the court of discretionary review seven additional copies of the briefs filed in the intermediate appellate court. If the brief was printed by the clerk pursuant to Rule 212(a)(3), the clerk will prepare the additional copies.

(b) Either party may serve and file a written request for oral argument in the court of discretionary review not later than 15 days after service of the order granting a hearing. If oral argument is timely requested, it will automatically be scheduled. When a request is made by one party, the right to oral argument extends to all parties. Oral argument shall be scheduled and held as provided in Rule 505.

(c) The party which filed the initial petition for hearing shall be entitled to open and close the argument. Where there are cross-petitions, the petition and cross-petition shall be argued together. In such cases,

the order of oral argument shall be determined by the court of discretionary review at the request of either party or upon its own motion.

Rule 305 COMMENT:

The draft follows the overwhelming majority of states in providing that the Supreme Court will use the briefs initially presented to the Court of Appeals. E.g., Hawaii Rev. Stats. 602-20(d); Oreg. R. App. P. 7.47; Wash. R. App. P. 13.7(a); Wisc. R. App. P. 809.62(4).

Paragraph (c) parallels draft Rule 213(b), relating to oral argument on appeals as of right.

PART FOUR. PETITIONS FOR REVIEW, ORIGINAL APPLICATIONS FOR RELIEF, AND OTHER SPECIAL PROCEEDINGS

Rule 401. Scope of Part Four

Part Four of these rules (Rules 401 through 408) governs requests for appellate review in circumstances in which there has been no final judgment within the meaning of Rule 202.

Rule 401 COMMENT:

The draft rules relating to petitions for review and original applications for relief (draft Rules 402 through 405) were prepared by Allison Mendel, assistant to the clerk during the summer of 1979. The commentary which accompanies them was also prepared by Allison Mendel at the same time. The rules and commentary are included herein with only technical changes made necessary by creation of the Court of Appeals, and a few stylistic changes.

In addition to petitions for review and original applications, provided for in the successors to former Rules 23-25, Part Four carries forward the provisions related to judicial discipline (former Rule 36) and certification of questions pending in federal courts (former Rule 44.1), since neither of them follows a "final judgment."

Rule 402. Petitions for Review of Non-Appealable Orders Or Decisions.

(a) When Available.

(1) An aggrieved party, including the State of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202, in any action or proceeding, civil or criminal.

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) When Granted. Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) the order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an

important public interest which might be compromised if the petition is not granted; or

(3) the trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) the issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

Rule 402 COMMENT:

Former Rule 23, replaced by this rule, is essentially a list of cases in which interlocutory review might be appropriate. It neither exhausts the possibilities, nor limits review to those cases which are enumerated. Furthermore, a case in which review is sought must also pass muster under former Rule 24(a) before review can be granted. See, e.g., Levi v. Sexton, 439 P.2d 423 (Alaska 1968). This process seems unnecessarily circuitous. Accordingly, I have suggested a balancing process whereby the circumstances which might justify review, draft Rule 402(b)(1) through (4), would be weighed against the policy favoring appeal from final judgment. This would, I think, achieve the same result as do the current rules, but more elegantly.[1] The draft includes some provisions for review of cases which are not currently enumerated in the rules, but which are clearly considered reviewable by the court. These include cases in which the public interest more than hardship to the individual litigant, justifies immediate review; and cases in which the

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1. For an explanation of how the current two-step approach is applied by the court, see State v. Silas, 595 P.2d 651 (Alaska 1979), Sumner Development Corp. v. Shivers, 517 P.2d 575 (Alaska 1974), Hanby v. State, 479 P.2d 486 (Alaska 1970), Levi v. Sexton, 439 P.2d 423 (Alaska 1968), Stokes v. Van Seventer, 355 P.2d 594 (Alaska 1960), State v. Hillstrand. 352 P.2d 633 (Alaska 1960), City of Fairbanks v. Schaible, 352 P.2d 129 (Alaska 1960).

lower courts have reached conflicting results on issues which would ordinarily evade review, or which would take too long to reach the appeal stage. These provisions are discussed in more detail below.

Conversely, I suggest eliminating sections (a), (b) and (c) of former Rule 23, which seem to throw no light on which cases are reviewable. This court has repeatedly held that the mere fact that a case satisfies one of these sections is not a ground for review. See Levi v. Sexton, id.; State v. Hillstrand, 352 P.2d 633 (Alaska 1960); City of Fairbanks v. Schaible, 352 P.2d 129 (Alaska 1960). Sections (a) and (b) are drawn directly from 28 U.S.C. § 1292(a), where they constitute an exclusive list of cases in which the federal Courts of Appeals have jurisdiction of appeals from interlocutory orders. They serve no such function in our rules.

I also suggest deleting the final paragraph of former Rule 23, for two reasons. First, it is incorrect. Relief formerly obtainable by the writs enumerated is not always available by petition for review, since petitions must be based on an order or decision of the trial court, and must ordinarily be filed within ten days. A case in which a writ of mandamus is sought to compel an action by the Superior Court, for instance, might require an original application under draft Rule 404 (former Rule 25).

Second, it seems better not to mention writs at all, since their dubious common law jurisprudence neither limits nor enlarges the appellate courts' jurisdiction. The draft rule categorically states that review of all nonappealable orders and decisions of the trial courts is available on a discretionary basis. Draft Rule 405(a) would direct parties seeking a common law writ to proceed under this rule or Rule 404, as may be appropriate.

Section (a) is the first paragraph of former Rule 23, with stylistic changes.

In a District Court criminal case, in which the appellant after final judgment has a choice which court to which to appeal, presumably a petitioner has the same choice on a petition for review. The draft does not address the question whether his choice on the petition binds him if he wishes to appeal after final judgment. Likewise, if the state petitions for review, does its choice of appellate forum bind the defendant should he be convicted and decide to appeal?

The first sentence in Section (b) is taken from former Rule 24(a)(2), with some modifications. This section enumerates the grounds on which review may be granted. The specific changes from current provisions are discussed below.

Section (b)(1) is essentially former Rule 23(e), with stylistic changes.

Section (b)(2) is derived from former Rule 23(d), with some important changes. I would delete the word "controlling" because it derives from 28 U.S.C. § 1292(b), where it limits the cases in which the trial judge may certify an order for interlocutory appeal. This has no relevance to Alaska procedure. The question of law raised by the petition need not be controlling, so long as it is important.

The final phrase of this section of the draft was added, as discussed in my general comments, to expressly provide for review in the class of cases in which the termination of the instant case may not be sufficiently important to justify review, but the public interest in settling the question is. The Supreme Court currently grants review in such cases, although there is no clear authority for it in the rules. See, e.g., Plas v. State 598 P.2d 966 (Alaska 1979); Plumley v. Hale, 594 P.2d 497 (Alaska 1979); Muller v. State, 478 P.2d 822 (Alaska 1971).

Section (b)(3) is former Rule 24(a)(3), also United States Supreme Court Rule 17(a), which concerns standards for the grant of certiorari. This seems an important provision.

Section (b)(4) would be an entirely new section. Although the Supreme Court currently grants review if the issue is one which evades review, e.g., Van Alen v. Anchorage Ski Club, Inc., 536 P.2d 784 (Alaska 1975), there is no

specific authority for it, and as a result the opinions often fail to explain why review is granted, or cite hardship and delay as the reasons. This invites a plethora of petitions in which hardship and delay are the only reasons supporting review, and the court usually does not grant such petitions. A more straightforward approach would be made possible by this section. It would also give authority for review if guidance of the trial courts is the primary motive for review, as it was in Silas, note 1 supra.

Rule 403. Petitions for Review - Procedure

(a) Filing.

(1) Petitions. A petition for review may be instituted by filing an original petition and five legible copies with the clerk of the appellate courts within ten days after the entry of the order or decision of which review is sought, along with proof of service on all parties to the action in the trial court. The court may require that additional copies be furnished. A judge or justice, for good cause shown, may extend the time for filing. The party seeking review shall be known as the petitioner. All other parties to the proceeding shall be named as respondents. A notice of review need not be filed with the trial court.

The running of the time for filing a petition for review is terminated by a timely motion filed in the trial court for reconsideration pursuant to Civil Rule 77(m). The full time for petitioning for review of the order sought to be reconsidered is computed from the entry of the trial court order granting or denying the motion for reconsideration. A motion for reconsideration which is not ruled upon within 20 days shall be considered denied.

(2) Cross-petitions. When a petition is filed under this rule, any other party may file a cross-petition for review of the same order. Cross-petitions must be

filed within ten days from service of the petition for review.

(3) Petitions from multiple orders. Where orders or decisions arising from different cases or proceedings pending in the same court are sought to be reviewed, and where they involve identical or closely-related questions, a single petition covering all the cases or proceedings may be filed.

(b) Contents of petition or cross-petition.

(1) The petition or cross-petition shall contain a:

[a] statement of facts necessary to an understanding of the question or questions determined by the order or decision of the trial court;

[b] statement of the question itself;

[c] statement of the reasons, under Rule 402, why review should not be postponed until appeal may be taken from a final judgment; and

[d] statement of the precise relief sought.

(2) The petition or cross-petition shall not exceed 15 pages in length, exclusive of appendices, and shall include or have annexed thereto:

[a] a copy of the order or decision of which review is sought, showing the date it was signed or entered; or a statement of the substance of the order or decision, if it was rendered orally; and

[b] copies of any findings of fact, conclusions of law and opinions related to the order or decision.

(c) Response. Within ten days after service of the petition or cross-petition, an adverse party may file an original and five copies of the response, together with proof of service. The response shall not exceed 15 pages in length, exclusive of appendices. No reply may be filed by the petitioner unless ordered by the court. A motion to dismiss the petition will not be received. Objections to the exercise of the discretionary power of the court must be included in the response.

(d) Form. Petitions, cross-petitions and responses shall be prepared in accordance with Rule 503(b).

(e) Inadequacy of the petition. The failure of the petitioner to include any matter required by section (b) of this rule, or otherwise to present briefly and clearly whatever is essential to a ready and adequate understanding of the questions presented for review, will be a sufficient reason for denying the petition.

(f) Consideration by the court. As soon as practicable, the matter shall be considered by the court, and unless otherwise ordered, without oral argument. The court, on request or on its own motion, may require submission of whatever portions of the record it considers necessary. If additional briefs are ordered by the court, they shall be prepared and filed as provided in Rule 212 and served by the clerk of court, unless otherwise ordered by the court. If review is granted by the court, the court may order the petitioner or cross-petitioner to file a bond for costs in accordance with Rule 204(c).

(g) Denial of petition. If the petition is denied, no mandate shall be issued; the clerk shall furnish a copy of the order denying review to the clerk of the trial court involved. A petition for rehearing of the denial of a petition for review may not be filed.

Rule 403 COMMENT:

This rule, former Rule 24, would become entirely procedural. The standards for grant of review contained in former Rule 24(a) are found in draft Rule 402. Revisions to this rule are mainly formal; I have tried to make provisions easier to find and to state them more clearly. This is made especially desirable by the recent revision of former Rule 24(c), which made the section a long, disorganized catchall.

Section (a)(1) derives from former Rule 24(b). Some stylistic changes are suggested. The provision of the current rule that a justice may extend the period for filing "for an additional period of 10 days" is deleted, since apparently current practice is to extend the time as the justice sees fit, even if it is longer than ten days. Provisions for cross-petitions are in the next section of the draft. The denomination of parties I imported from former Rule 24(c) because it seems more appropriate here.

Civil Rule 77(m), referred to in paragraph (a)(1), was formerly designated 77(n), but was relettered by Supreme Court Order No. 434, effective November 1, 1980.

Section (a)(2) is the last two sentences of former Rule 24(b). The time for filing cross-petitions is extended from five to ten days, so that the cross-petition will be due at the same time as the response to the lead petition.

Section (a)(3) is found in former Rule 24(c).

Section (b) is a rearrangement of most of the provisions of former Rule 24(c).

Section (b)(1) is a slight modification of former Rule 24(c)(1), (2) and (3). The modifications comport with the draft Rule 402. The old provisions are copies from the federal Appellate Rule 5, which implements 28 U.S.C. § 1292.

Section (b)(2) is from former Rule 24(c).

Section (c) is in former Rule 24(c).

Section (d) is also from former Rule 24(c).

Section (e) is essentially the second sentence of former Rule 24(e), with modifications to comport with the other draft revisions of the rule. I think that separating this provision out might serve to emphasize it.

Section (f) would consolidate provisions from former Rule 24(c), (d) and (e), all pertaining to the procedure followed by the court in considering petitions (and original applications as well; see draft Rule 404).

Section (g) - see the comment to draft Rules 506 & 507.

Rule 404. Original Applications

(a) When filed.

(1) An original application for relief may be filed with the appellate court or a judge or justice thereof in any matter within its jurisdiction, whenever relief is not available from any other court and cannot be obtained through the process of appeal or petition for review. Grant of the application is not a matter of right but of sound discretion sparingly exercised.

(2) An original application for relief, if seeking relief in connection with an action or proceeding in a trial court, shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in that action or proceeding.

(3) An original application for relief, if not ancillary to an action or proceeding in a trial court, may be directed to any appellate court having jurisdiction under the applicable statutes.

(b) Procedure. A party who seeks original relief shall proceed as follows:

(1) There must be filed with the clerk of the appellate courts an original and five legible copies of the application, together with such portion of the record and proceedings of the court below as is needed for the purpose of determining whether the relief sought will be granted. The application must state the

precise nature of the relief sought, and why that relief is not available in any other court, or by petition for review or by appeal.

(2) The application shall be served on all other parties to the proceeding in respect of which relief is sought, and when filed shall be accompanied by proof of service. If the petitioner seeks an order from the appellate court commanding or restraining an act of a person, agency, or tribunal not a party to the proceedings, the petition shall also be served on such persons, agencies, or tribunals.

(3) If the application seeks a writ of habeas corpus, it shall comply with the requirements of Civil Rule 86(b), and shall state the reason for not making application to the superior court. The application shall also specifically set forth how the applicant has exhausted all other remedies available by law or rule.

(c) Response. Each respondent shall have ten days after service of the application upon him within which to serve and file an original and five legible copies of the response. The court or a judge or justice thereof may, for good cause shown, extend the time for filing. If the application seeks the issuance of a writ of habeas corpus, response shall be made in accordance with Civil Rule 86(g). When the response is filed, it shall be accompanied by proof of

service. Replies and supplemental memoranda will not be received unless ordered by the court. A motion to dismiss the application will not be received. Objections to the exercise of the discretionary power of the court must be included in the response.

(d) Form. The preparation and service of all original applications and responses thereto shall be governed by Rule 503(b).

(e) Consideration by the court. The application shall be considered in accordance with Rule 403(f) relating to petitions for review.

Rule 404 COMMENT:

I have offered no substantive revisions to this rule, former Rule 25. I have tried to clean up the language, to make it more accurate, and to make it complementary to draft Rule 402, so that relief would be available in all cases in which the appellate courts have statutory jurisdiction.

Former Rule 25(b) would be removed to draft Rule 405, where it properly belongs. It refers to both petitions and applications, so it is misleading to put it in the rule on original applications.

Section (a) is derived from the first paragraph of former Rule 25(a). I would delete the reference to "writs authorized by law" since as I interpret the law the writs formerly enumerated in AS 22.05.010 are merely examples and do not define the scope of this court's jurisdiction. See State v. Browder, 486 P.2d 925 (Alaska 1971). (Chapter 12, SLA 1980, amends the statute to authorize the Supreme Court, like the Court of Appeals,to issue "writs," not further specified.) The draft section merely authorizes an original application whenever the matter is within the jurisdiction of the court. Draft Rule 405(a) refers parties seeking writs either to this rule or Rule 402, as appropriate.

I have also added the caveat, formerly implicit, that original applications are available only when relief cannot be had by review or appeal. See, e.g., State v.

Clayton, 584 P.2d 1111 (Alaska 1978); Continental Insurance Cos. v. Bayless & Roberts, Inc., 548 P.2d 398 (Alaska 1976).

Section (b)(1): The first sentence of this section is taken from the former Rule 25(a)(1). The second sentence is taken from the former Rule 25(a)(2), with the additional requirement that the relief sought be specified in the application.

Section (b)(2) is intended to restate the requirements of former Rule 24(a)(3). In line with elimination of all references to specific writs, I suggest a new version of the second sentence to convey what I assume is the intent of the current rule.

Section (b)(3) is drawn from former Rule 25(a)(6). I would delete the reference to "statutes relating to habeas corpus," since the procedure is now provided for by rule. The draft substitutes the requirement that the application conform to Civil Rule 86(b), relating to habeas corpus proceedings in superior court. That rule seems equally appropriate here.

I would delete the provision of the current rule allowing ex parte proceedings to follow what apparently is our current practice: to request a response in all cases. Particularly when the petition is pro se, the response frequently clarifies the situation substantially and assists the court in determining whether relief is warranted.

Section (c) is based on former Rule 25(a)(4) and (5). In line with the previous section, the respondent in habeas corpus proceedings would be required to comply with Rule 86 (g). I suggest increasing the time for filing to be consistent with Rule 403 on petitions for review.

What was formerly Rule 25(a)(5) has been completely revised in the draft in the spirit of draft Rule 403. No replies or supplements would be allowed unless ordered by the court, and objections must be contained in the answer. I can perceive no rational basis for following a different procedure in petitions for review and original applications, as far as these provisions go. If the issues are unclear, the court could order whatever additions it desires. See section (e) infra.

Section (d) follows former Rule 25(a)(1) and (4).

Section (e), draft rule 403(f) outlines a procedure for consideration by the court that should be appropriate for both applications and petitions.

Rule 405. Relief Available; Applications for Stay.

(a) Relief available. Relief in the nature of writs of review, mandamus, prohibition, certiorari, or other writs, shall be sought by petition for review under Rule 402 or original application under Rule 404, as may be appropriate. On the granting of a petition for review or original application, the appellate court will grant such relief as may be appropriate in the circumstances, in accordance with Rule 520.

(b) Stay. Proceedings in the trial court or the enforcement of any order or decision thereof shall not be stayed by the filing of a petition for review or of an original application for relief unless the trial or appellate court, or a justice or judge thereof, so orders. Application for stay will be granted by the appellate court or a justice or judge thereof only in accordance with Rule 205 or 206.

Rule 405 COMMENT:

Subsection (a). This subsection makes explicit that whatever relief the appellate courts are authorized to give under AS 22.05.010 or AS 22.07.020 may be sought by petition for review or original application. It then refers to Rule 520, which defines the "General Authority of the Appellate Courts."

Subsection (b) is former Rule 25(b). It does not belong in Rule 404 (former Rule 25) because it applies to both petitions for review and original applications.

Reference to petitions for certiorari and appeals to the United States Supreme Court are deleted, both because these are unlikely to follow from interlocutory orders, and because they are inconsistent with former Rule 8. The second sentence of the old rule is preserved intact. The new section would refers to Rules 205 & 206, successors to former Rule 8, which specify the procedure for procuring a stay.

Rule 406. Review of Proceedings of Judicial Qualifications Commission.

(a) A petition to the Supreme Court to modify or reject a recommendation of the Judicial Qualifications Commission for censure, removal or retirement of a judge may be filed within 30 days after the filing with the Clerk of the Supreme Court and service upon the judge of a certified copy of the recommendation. The petition shall specify the grounds relied on and shall be accompanied by petitioner's brief and proof of service on the chairman of the Commission. Within 30 days after receipt of the petition the Commission may serve and file a respondent's brief. Within 20 days after service of such brief, the petitioner may file a reply brief which shall be served on the Commission.

(b) If no petition is filed the matter may be considered on the merits based upon the record filed by the Commission.

(c) Upon recommendation of the Commission that a judge be suspended pursuant to AS 22.30.070(b) or on the Supreme Court's own motion for a suspension, a judge, upon his request, shall be provided a hearing before the Supreme Court.

(d) The rules governing appeals from the Superior Court in civil cases shall apply to proceedings in the Supreme

Court for review of a recommendation of the Commission except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

(e) The records of all proceedings in the Supreme Court shall be public from the time of filing the petition in the Supreme Court.

(f) When the proceedings involve a Supreme Court justice, no justice may participate in the review, and the chief justice shall appoint a panel from among the Court of Appeals and Superior Court judges as justices pro tempore to review the proceedings. If the proceedings involve the chief justice, the the justice having the longest tenure on the Supreme Court who has not participated in the proceedings shall appoint the panel.

Rule 406 COMMENT:

One change from former Rule 36 is in subsection (f), pertaining to proceedings concerning a Supreme Court justice. The draft allows the selection of the pro tem justices to hear the case from among the Court of Appeals and Superior Court judges. The former rule referred only to Superior Court judges. Also, paragraph (c) is changed to conform to Rule 14 of the Model Rules for Judicial Discipline, by providing for a post-suspension hearing on the judge's request, rather than a mandatory pre-suspension hearing.

Rule 407. Certification of Questions of State Law.

(a) The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.

(b) This rule may be invoked by an order of any of the courts referred to in Section (a).

(c) A certification order shall set forth

(1) the questions of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(d) The certification order shall be prepared by the certifying court, signed by the judge presiding over the cause, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the certifying court to file the original or copies of all or any portion of the record before the certifying court if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) Notice of the Supreme Court's decision whether to answer the questions certified to it shall be given to the certifying court by the Clerk of the Supreme Court. Further proceedings, if any, in the Supreme Court shall be in accordance with the provisions of these rules governing briefs and arguments, unless otherwise ordered by the court.

(f) The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the Clerk of the Supreme Court to the certifying court and to the parties. The answer to the certified questions shall be res judicata as to the parties and have the same precedential force as any other appellate decision of the Supreme Court.

Rule 407 COMMENT:

Former Rule 44.1, carried over with no change. This rule, which has never been invoked, permits federal courts to certify questions of state law to the Alaska Supreme Court. Under the draft, federal courts are not permitted to certify questions to the Court of Appeals.

Of the 28 states, excluding Alaska, that have intermediate courts, thirteen have some sort of certification procedure.[1] Of these thirteen, all require certification to the highest state court, i.e., questions cannot be certified to the intermediate court.[2]

Most of the thirteen states limit their certification procedure to questions certified by the federal courts.[3] However, four -- Kentucky, Maryland, Massachusetts and Oklahoma -- will accept certified questions from the appellate courts of sister states. Maryland and Oklahoma will accept questions from either a high or intermediate state court, while Kentucky and Massachusetts will accept them only from high courts.

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1. Alabama, Colorado, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Maryland, Massachusetts, New Mexico, Oklahoma and Washington.

2. In Oklahoma, there are two high courts, the Supreme Court for civil matters and the Court of Criminal Appeals for criminal matters. Questions may be certified to either court.

3. There is a further split here. Some states, like Alaska, accept questions from federal district courts, and others accept them only from the federal appellate courts.

There is also a split concerning when certification is appropriate.[4] In eight states certification is allowed as long as there is no governing decision of the state's highest court; i.e., a question may be certified even if there is a decision on point from the intermediate court.[5] In Georgia, Iowa, Kentucky and New Mexico a question may be certified only if there is no governing decision of any appellate court. In Washington the law on this point is unclear, as the statute provides for certification when the law is "not clearly determined."

Seven of the thirteen states[6] have adopted the Uniform Certification of Questions of Law Act, 12 U.L.A. 49 (1975). This is a highly flexible act, allowing adopting jurisdictions to limit certification to federal courts or to extend it to state courts, and granting them leeway as to when certification is appropriate. See § 1 of the Act. However, the Act and its commentary make clear the drafters' intention that only the highest court of a state answer certified questions.

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4. Alabama, Colorado, Florida, Hawaii, Indiana, Maryland, Massachusetts and Oklahoma.

5. In such a case, however, the high court might simply decline to accept the certified question.

6. Colorado, Florida, Iowa, Maryland, Massachusetts, Oklahoma and Washington.

Rule 408. Transfer of Appellate Cases.

(a) When the Supreme Court transfers a case to the Court of Appeals pursuant to AS 22.05.015(a), the clerk shall serve a copy of the transfer order on all parties. The Court of Appeals or the clerk shall thereupon advise the parties of the course of proceedings to be followed in the Court of Appeals.

(b) When the Court of Appeals certifies to the Supreme Court that a case should be decided by the Supreme Court, pursuant to AS 22.05.015(b), a copy of the certificate, and of the order of the Supreme Court accepting or rejecting it, shall be served on all parties. Unless the Supreme Court orders to the contrary, pleadings from the parties addressing the question whether or not the Supreme Court should accept the certificate, will not be received. Requests that the Court of Appeals issue such a certificate should be addressed to the Court of Appeals, must be accompanied by proof of service on all parties, and must state clearly and concisely why the case fits within the statutory standards. The Court of Appeals may in its discretion request responses from the other parties. A decision of the Court of Appeals refusing to issue such a certificate may not be the subject of a petition for hearing in the Supreme Court.

(c) When a case is transferred between appellate courts pursuant to AS 22.05.015(c), the transferring court or the clerk shall advise the parties of the reasons for the transfer, and the transferee court or the clerk shall advise the parties of the course of proceedings which will be followed in the transferee court.

Rule 408 COMMENT:

This rule provides procedures for the three circumstances in which the statute permits cases to be transferred from one appellate court to another.

Subdivision (a) refers to cases within the jurisdiction of the court of appeals pending in the Supreme Court. It is principally, but not entirely, intended to provide for the initial transfer of cases pursuant to § 34 of Chapter 12 SLA 1980.

Paragraph (b) provides the only procedure in which the Supreme Court can decide a criminal case prior to a decision of the Court of Appeals. The statute contemplates a two-step procedure in which the Court of Appeals must affirmatively certify that the case should be taken by the Supreme Court, and the Supreme Court thereafter must agree to accept the certificate. The rule as drafted attempts to channel the input of the parties on this question. The decision of the Court of Appeals to decline to issue a certificate is by this draft made non-reviewable. This is the same as the interlocutory appeal procedure under 28 USC § 1292, and is also the same as the procedure under Federal and Alaska Civil Rule 54(b) for the certification of partial final judgments. See Curtiss-Wright Corp. v. General Electric Co., ___ U.S. ___, 48 USLW 4422 (Apr. 22, 1980). The draft as written leaves open the possibility of seeking an extraordinary writ in the Supreme Court directing the Court of Appeals to certify a case. It seems highly unlikely

that a case would seem that compelling both to a party and to the Supreme Court, without appearing sufficiently compelling to the Court of Appeals. It should also be borne in mind that this Rule, like every other Appellate Rule, can be waived. See the comment to Draft Rule 521.

Paragraph (c) refers to the transfer of cases filed in the wrong court. It is written to permit the clerk to make such transfers without court action in cases where the need for transfer is obvious, as will be particularly likely during the first few months of operation of the Court of Appeals.

PART FIVE. GENERAL PROCEDURES

Rule 501. Scope of Part Five.

Part Five of these Rules (Rules 501 through 523) applies to all proceedings in the Supreme Court and the Court of Appeals.

Rule 501 COMMENT:

Grouped in Part Five are all rules of general application which apply not only in both courts but also in both appeals by right and discretionary proceedings.

Rule 502. Time--Computation and Extension.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Extensions of Time. When by these rules or by a notice given thereunder or by order of the appellate court an act is required or allowed to be done at or within a specified time, the appellate court may in its discretion, either on motion of a party, showing good cause, or sua sponte,

(1) extend the time period, either before or after its expriation or

(2) validate an act done after the expiration of the time period.

Motions to extend a time period, or to validate an act done after the expiration of the time period, must comply with

Rule 503. Time periods specified in the Appellate Rules, including time periods for doing an act or filing a document in the trial court, may be extended only by the appellate courts and not by the trial court.

(c) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(d) Mailing of Papers for Filing. Papers may be filed with the appellate courts by mailing them to the clerk, but they shall be considered filed on the date they are received by the clerk. They shall be considered timely filed only if they are received by the clerk within the time permitted for their filing.

Rule 502 COMMENT:

(a) Carries over former Rule 38(a) with one change. Former Rule 38(a) provides that a period of "7 days or less" does not include intervening Saturdays, Sundays and holidays. In other words, at present a seven-day period, such as the period for responding to a motion in former Rule 14(b), consists of seven business days. This draft provides that only a period of "less than 7 days" omits intervening non-working days. Under the new draft, a seven-day period would consist of seven calendar days, a shorter time.

The reason for this change relates to the addition in 1979 of former Rule 38(c), adding three extra days to time periods calculated from service of a prior document, when service is by mail. Service, even within downtown Anchorage, is usually by mail. Under former Rule 38(a), when service is by mail the period of seven business days becomes ten calendar days, which usually gives only one day more. The new draft provides an actual addition of three days in this most common situation: if the motion is served by hand, the response is due in seven calendar days; if it is served by mail, the response is due in ten calendar days.

(b) Former Rule 38(b) rewritten without substantive change. The last sentence is new to the rules, but incorporates present policy, that the trial court cannot extend the time for filing the notice of appeal or accompanying papers.

(c) Former Rule 38(c) without change.

Rule 502 COMMENT continued:

(d) New. Based on FRAP 25(a). This subsection states in the rules for the first time a policy which has been in effect previously: that papers mailed to the clerk are filed on the date of receipt, not the date of mailing, and therefore must be mailed sufficiently in advance of the due date to insure that the clerk will receive them before they become overdue.

Rule 503. Motions.

(a) General. An application for relief of any kind from either appellate court ancillary to a case in that court shall be made by written motion.

(b) Format. All motions filed in the appellate courts must be on plain white, legal size, opaque, and unglazed paper. The type must be legible and 10 pitch (10 characters per inch). Only one side of the paper may be used, and the margins and spacing must be similar to those used in briefs. The pages must be numbered consecutively at the bottom center of the page. The motion must include:

(1) A brief, complete statement of the reasons in support of the motion;

(2) An affidavit where the facts relating to the motion are not otherwise proven;

(3) If the motion is for an extension of a time period prescribed in these rules, a statement of each extension of that time period previously granted to that party, indicating the length of each extension;

(4) The points and authorities on which the moving party relies; and

(5) An appropriate order for execution by the court should the motion be granted.

(c) Filing and Service. The original of the motion must be filed with the clerk, together with proof of service on all other parties except as provided in paragraph (h) of this rule.

(d) Opposition to Motion -- Disposition. Except as otherwise provided in paragraph (h) of this rule, adverse parties have seven days after service of a motion within which to file and serve memoranda in opposition, counter motions and affidavits. As soon as practical after expiration of the seven-day period, the motion will be considered. A reply memorandum may not be filed by the moving party unless otherwise ordered. Oral argument will not be heard on motions unless otherwise ordered.

(e) Motions Determined by the Clerk. Routine, unopposed motions may be ruled upon by the clerk without reference to the court or a judge or justice. A party who is aggrieved by the decision of the clerk on a motion may file a motion for reconsideration of the clerk's order, which motion will be determined by an individual justice or judge. The clerk may not determine a motion of a type listed in paragraph (h)(2) of this rule.

(f) Motions Determined by an Individual Justice or Judge. Any motion which would not have the effect of

determining the merits of a proceeding, and which is not appropriate for determination by the clerk, may be determined by an individual justice or judge without reference to the full court. Motions shall be referred to justices and judges by the clerk under the direction of the court. A justice or judge may in his discretion refer such a motion for decision by the full court.

(g) Motions Determined by Full Court. A motion which would have the effect of determining the merits of a proceeding, a motion for reconsideration of an order entered by an individual justice or judge, or a motion referred to the full court by a justice or judge, shall be considered by the full court. An individual justice or judge may, in connection with such a motion, enter such orders as may be necessary to prevent irreparable harm prior to the time that the full court is able to consider the motion. Motions for reconsideration of orders of the full court granting or denying motions will be accepted only on a showing of good cause.

(h) Initial Motions for Extensions of Time.

(1) In a case pending in the Supreme Court, the first motion for an extension of time to file a document need not be served on other parties if the requested extension of time is for cause shown and does not exceed 20 days. Such a motion shall be

granted automatically by the Clerk. This paragraph does not apply to a case pending in the Court of Appeals.

(2) Paragraph (1) does not apply to a motion to extend the time for filing a notice of appeal, petition for review, petition for rehearing, or petition for hearing. Nor does it apply to a motion if the time period specified in these rules for filing the document has already expired when the motion is filed.

Rule 503 COMMENT:

(a) New. Based on FRAP 27(a).

(b) Former Rules 12(b) and 14(a). Paragraph (3) is taken from former Rule 37(b). The requirement that the movant submit a form of order for use by the clerk or the court is retained. Although these form orders cannot always be used, quite frequently they can be, saving clerical time. In all instances, they require counsel to state clearly exactly the relief which is sought.

The former rule introduced the list of numbered items with "There shall be filed and served with the motion:" This invited ambiguity whether there must be a separate piece of paper called "Motion," in addition to all these things and whether each numbered item was required to be on a separate piece of paper. The clerk's office answered both questions, "no." To make that policy more clear, the introductory language in the draft reads, "The motion shall include:"

(c) Former Rules 14(a) and 37(d).

(d) Former Rule 14(b) and 37(g) without substantive change.

(e) Former Rule 14(c) and 37(e) without substantive change. Draft Rule 505(c) provides a motion to postpone oral argument shall not be ruled on by the clerk. Draft Rule 403(a)(1) provides that a motion to extend the time to file a petition for review shall not be ruled on by the clerk.

(f) Successor to former Rule 37(a) and (h). Former Rule 37(a) contains a lengthy list of types of motions appropriate for single-justice action, many of which are in fact appropriate for decision by the clerk without judicial attention. The list ends with a catch-all "other routine matters of similar nature." The new draft does not attempt to list appropriate single-justice motions. It merely states that any motion other than one which would determine the merits of the case is at least potentially appropriate for action by a single judicial officer, and provides that the single justice or judge can refer any such motion to the full court. For the first time, the draft makes clear that the movant cannot choose the judge who will hear the motion, and that the movant cannot approach a judge directly, except in emergency situations or at locations where only one judge of the appropriate court is available.

(g) New. Although a justice or judge considers the probable outcome on the merits in deciding whether to grant a stay or an interim injunction, the motion for stay or interim injunction does not "have the effect of determining the merits" of the case and such a motion does not require the action of the full court. This is true even if the denial of a stay would make an appeal moot. The "effect" referred to is the legal effect, not the practical effect.

The single judge or justice still has not actually decided the appeal on its merits. Insofar as this paragraph states that an individual justice or judge may not decide a motion which has the effect of determining the merits of a proceeding, it is arguably contrary to former Rule 37(f) which permits an individual justice to issue a writ of habeas corpus. On occasion, petitions are filed in which the entire "proceeding" in the appellate court is a request for a writ of habeas corpus. On the other hand, the former rule may contemplate a writ of habeas corpus returnable before the full court at a later time.

Former Rule 37(f) is not carried over, in the belief that it is largely superfluous, particularly as it permits an individual justice to "determine other matters which may be properly considered by him."

(h) Former Rule 37(b) rewritten. The rule makes explicit the present unwritten practice not to apply this rule to requests to extend the time to file notices of appeal, petitions for review, and petitions for rehearing. Notices of appeal and petitions for review initially invoke the jurisdiction of the court; petitions for rehearing prevent that jurisdiction from automatically terminating. Petitions for hearing are added to the list for similar reasons. By request of the Court of Appeals, this automatic extension procedure has been limited to motions filed in the Supreme Court.

Former Rule 37(c) provides that motions to file overlength documents need not be served on opposing counsel. This has been omitted from the revised rules. Former Rule 11(b)(4), continued without substantive change in the revised rules, requires that the motion for overlength be accompanied by a complete copy of the proposed overlength document. The document itself must, in turn, be served and be accompanied by proof of service. If opposing counsel is familiar with the rules, and takes time to examine the document, he or she will be able to discern that it is overlength. Little seems to be gained by retaining former rule 37(c), which is a holdover from the time when motions for overlength were not required to be accompanied by the proposed overlength document.

Rule 504. Emergency Motions.

Whenever a party requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the court to receive and consider a response:

(a) The motion shall comply with Appellate Rule 503(c) except as that rule may be specifically inconsistent with this one;

(b) The word "Emergency" shall be placed at the top of the first page of the motion;

(c) The motion shall include the telephone numbers and office addresses of moving and opposing counsel;

(d) The motion shall be accompanied by a written statement of facts showing the nature of the emergency and the date and hour before which a decision is needed;

(e) The motion shall state whether all grounds advanced in support thereof were submitted to the trial court and, if not, why the motion should not be remanded to the trial court for reconsideration;

(f) The motion shall be accompanied by a written statement by the movant or his attorney, indicating when and how opposing counsel was notified of the motion, or, if opposing counsel was not notified, indicating what efforts

were made to notify opposing counsel and why it was not practicable to notify opposing counsel in a manner and at a time that counsel could respond to the motion;

(g) The court will not grant the motion prior to written or oral notice to opposing counsel unless it clearly appears from specific facts in the motion papers or the court records that immediate and irreparable injury, loss or damage would result to the applicant before notice could be given and opposing counsel given a reasonable opportunity to respond.

If an emergency motion is granted without notice to opposing counsel and opposing counsel thereafter files a motion to vacate or reconsider the order thus entered, the court will take into account the fact that the original order was entered without notice.

If it appears appropriate in the circumstances, the court or the judge or justice to whom the matter is assigned may permit the opposing party to respond to the motion orally rather than in writing. As provided in Rule 503(d), oral argument of emergency motions is not permitted unless ordered by the court or a judge or justice.

Rule 504 COMMENT:

Former Rule 37.1 without substantive change.

Rule 505. Oral Argument.

(a) Scheduling. The clerk shall prepare the calendars of cases for oral argument, under the direction of the courts. The clerk shall give written notice to counsel of record of the time and place at which argument is scheduled.

(b) Order of Preference. Any case entitled by law or court rule to preference shall be placed on the first oral argument calendar prepared after the completion of briefing. All other cases shall be scheduled for oral argument in the order in which briefing is completed or the petition for hearing granted.

(c) Postponement. Once a case has been placed on the calendar for oral argument, argument will not be postponed except upon filing of a motion accompanied by an affidavit of counsel or the party or both showing good cause for postponement. Notwithstanding Rule 503(e), such a motion shall not be ruled upon by the clerk.

(d) Limitation of Counsel. Unless otherwise ordered by the court, no more than two counsel will be heard for each party on the argument of the case.

(e) Length of Arguments. Argument shall not exceed one-half hour by each side, unless otherwise ordered by the court. Argument of shorter duration may be prescribed by the clerk under the direction of the court.

Rule 505 COMMENT:
Rules 13 and 18(c) and (d) rewritten without substantive change. An example of a rule giving certain appeals calendar preference is Children's Rule 29(b).

Rule 506. Rehearing.

(a) Grounds for Petition. The court may order a rehearing of a matter previously decided if, in reaching its decision

(1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or

(2) The court has overlooked or misconceived some material fact or proposition of law; or

(3) The court has overlooked or misconceived a material question in the case.

A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court.

(b) Time for Filing--Form of Petition. An original of a petition for a rehearing must be filed within ten days after the filing of the opinion or other decision. The petition must be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. The petitioner shall specifically state which of the grounds for rehearing specified in paragraph (a) exists, and shall specifically designate that portion of the opinion, the brief, or the record, or that particular authority, which the petitioner wishes the court to consider. The petition shall be prepared in conformity

with Rule 503(b) and when filed shall be accompanied by proof of service on all parties. No petition for rehearing shall exceed three typewritten pages. No memoranda or briefs in support of or in opposition to a petition for rehearing shall be received unless requested by the court.

Rule 506 COMMENT:

Former Rule 27 restated. In this connection, mention should also be made of draft rules 303(e) and 403(g), which provide that the denial of a petition for hearing or a petition for review is not subject to a petition for rehearing. These rules, like all the others, can be waived if necessary, see Rule 521, but in the ordinary case petitions for rehearing in these circumstances have no realistic chance of success and do little other than to delay the judicial process.

Rule 507. Mandate.

(a) Clerk to Issue. Except as otherwise provided in these rules, upon the conclusion of proceedings in the appellate courts and the payment of all fees due the clerk in connection with the case, the clerk shall issue a mandate informing the trial court of the proceedings in the appellate courts. Upon issuance of the mandate, full jurisdiction over the case returns to the trial court, unless the mandate expressly states otherwise.

(b) Time.

(1) Unless the court otherwise orders, the clerk shall issue the mandate on the day specified in this subsection.

(2) In a case in which the appeal is decided by the Court of Appeals, the mandate shall be issued:

[a] on the day after the time for filing a petition for hearing expires, if no timely petition for hearing is filed;

[b] on the day after the petition for hearing is denied, if a timely petition for hearing is denied; or

[c] as provided in the next paragraph, if a petition for hearing is granted.

(3) In a case in which the appeal is decided by the Supreme Court the mandate shall be issued:

[a] on the day after the time for filing a petition for rehearing expires, if no timely petition for rehearing is filed; or

[b] on the day after the Supreme Court disposes of the case on rehearing, if a timely petition for rehearing is filed.

Rule 507 COMMENT:

This rule replaces former Rule 28. The first sentence of subsection (a) restates the former rule without substantive change. The "except as otherwise provided in these rules" refers to draft Rule 403(g), which provides that no mandate is issued when a petition for review is denied, and draft Rule 511(d), which provides that no mandate is issued when an appeal is dismissed.

The second sentence of subsection (a) is new, but merely makes explicit present policy: that the issuance of the appellate mandate returns full jurisdiction over the case to the trial court, unless the mandate itself states otherwise.

Subsection (b) retains the present time schedule for issuance of mandates, incorporating only the changes made necessary by the possibility of a petition for hearing in the Supreme Court after the decision of the Court of Appeals. It essentially provides that the mandate will be issued the day after the deadline for further timely action with respect to the case. This means, for example, that in a criminal appeal the clerk will not send down a mandate until either the Supreme Court has denied a hearing or the time for filing a petition for hearing has expired. If the Supreme Court grants a hearing, no mandate will be sent down until the Supreme Court has decided the case. A second, supplemental, revised or amended mandate will be necessary only if one or the other appellate courts permits the filing

of an untimely petition for rehearing or petition for hearing, and thereafter acts on the untimely document.

Rule 508. Costs.

(a) Dismissal or Denial. If an appeal is dismissed or petition denied by the appellate court, costs shall not be allowed to the appellee or respondent, unless otherwise ordered by the court.

(b) Affirmance of Judgment. In all cases of affirmance of a judgment or any order or decision of the Superior Court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

(c) Reversal of Judgment or Order. In cases of reversal of any judgment, order or decision of the Superior Court, costs shall be allowed the appellant or petitioner unless otherwise ordered by the court.

(d) Costs to be Awarded. When costs are awarded in the appellate court, they shall include, unless the court otherwise orders, the filing fee, the costs of preparing the original record and transcript, and the costs of duplicating and mailing briefs. Costs for duplicating briefs will not be awarded in excess of the rate generally charged by printers in the city in which counsel is located.

(e) Attorney's Fees. Where costs are allowed in the appellate court, attorney's fees may also be allowed in an amount to be determined by the court. If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay,

actual attorney's fees may be awarded to the appellee or cross-appellee.

(f) Procedure Where Allowed. Where costs are allowed in the appellate court, the clerk shall insert the amount thereof in the body of this mandate or other process sent to the court below, and annex to the same the bill of items taxed in detail.

Rule 508 COMMENT:

Former Rule 29. The material in draft paragraph (d) formerly appeared in paragraph (c), but applies to both paragraphs (b) and (c). The ceiling on printing costs for briefs is new, and is based on Federal Appellate Rule 39(c). Occasionally briefs are duplicated on office copiers and then included in the bill of costs at 25 cents per sheet, or some other figure several times in excess of the rate charged by commercial printers.

Rule 509. Interest.

In all cases where a money judgment of the trial court is affirmed, interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that judgments bear interest in the courts in this state.

Rule 509 COMMENT:

Former Rule 30 without substantive change.

Rule 510. Monetary Sanctions.

(a) When Appeal Brought for Delay. Where an appeal or petition for review shall delay the proceedings in the trial court or the enforcement of the judgment or order of the trial court, and shall appear to have been filed merely for delay, monetary sanctions may be awarded in addition to interest, costs and attorney's fees.

(b) Infraction of Rules. For any infraction of these rules, the appellate court may withhold or assess costs or attorney's fees as the circumstances of the case and discouragement of like conduct in the future may require; and such costs and attorney's fees may be imposed upon offending attorneys or parties.

Rule 510 COMMENT:

Former Rule 31, deleting references to "damages" and substituting "monetary sanctions".

Rule 511. Dismissal of Causes.

(a) Dismissal by Agreement. Whenever the parties, by their attorneys of record, shall file with the clerk of the appellate court an agreement in writing that an appeal or petition be dismissed, specifying the terms with respect to costs, and shall pay to the clerk any fees that may be due him, the clerk shall enter an order of dismissal without further reference to the court.

(b) Dismissal by Appellant or Petitioner.

(1) Whenever an appellant or petitioner in the appellate court, by his attorney of record, shall file with the clerk of that court a motion to dismiss a proceeding to which such appellant or petitioner is a party, with proof of service as prescribed by these rules, and shall tender to the clerk any fees and costs that may be due, the adverse party, within seven days after service thereof, may file an objection, after which time the matter shall be determined by the court.

(2) If no objection is filed, the clerk shall enter an order of dismissal without further reference to the court.

(c) Dismissal in Other Cases. At any time the appellate court may entertain a motion to dismiss an

appeal for failure to prosecute the same or for failure to comply with these rules.

(d) Mandate Not Required. No mandate or other process shall issue on a dismissal under this rule without an order of the court.

Rule 511 COMMENT:

Former Rule 32 with one substantive change. Paragraph (c) is amended to delete the reference to motions by the respondent to dismiss a petition for review. Draft Rule 403(c), carrying forward former Rule 24(c), forbids the filing of such a motion to dismiss. Grounds for dismissal should be included in the opposition to the petition. That seems the preferable approach, so the inconsistent provision at this point has been deleted.

Rule 512. Record and Briefs After Final Determination.

After final determination of any matter in the appellate courts the record shall be returned to the Clerk of the Trial Courts for permanent filing. All documents filed with the appellate courts shall be retained by their clerk as part of their permanent records.

Rule 512 COMMENT:

Former Rule 33 without substantive change.

Rule 513. Translations.

Whenever any record transmitted to the appellate courts shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding made under the authority of the trial court or admitted to be correct, the record shall not be filed, but the case shall be reported to the appellate court by the clerk, and the court will thereupon remand it back to the trial court in order that a translation may be supplied and inserted in the record.

Rule 513 COMMENT:

Former Rule 15 without substantive change.

Rule 514. Service--Appearance of Counsel--Signing of Documents.

(a) In General. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with or mailing it to the clerk of the appellate courts. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(b) Service on State. If the State of Alaska or an officer or agency thereof is a party, service of all motions, notices, briefs, petitions or other documents shall, notwithstanding the foregoing paragraph, be made upon the Attorney General of Alaska, at Juneau, Alaska. A copy shall also be served upon the attorney of record (if he is not the Attorney General) who represented the State of Alaska or its officer or agency in the court whose judgment, order or decision is involved.

(c) Proof of Service--How Made. Proof of service shall be made in conformity with Civil Rule 5(f).

(d) Proof of Service--Filing. Where proof of service is required, it shall be filed with the clerk in conformity with Civil Rule 5(e).

(e) Entry of Appearance. Any document filed with the clerk by or on behalf of counsel whose appearance has not previously been entered must be accompanied by an entry of appearance.

(f) Signing of Documents. All documents presented to the court, other than records, must bear the manuscript signature and post office address of the member of the bar who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other counsel and their addresses may be added.

(g) Notice of Question of Constitutionality of Statute. When the constitutionality of a state statute is drawn in question in any appeal or other proceeding in the appellate courts to which the state or an officer, agency, or employee thereof is not a party, the party raising the question shall give immediate notice in writing to the court of the existence of the question. The clerk of court shall notify the Attorney General of Alaska of the case raising the question.

Rule 514 COMMENT:

Former Rule 39, carried forward with minor changes. In paragraphs (c) and (d), references have been added to specific paragraphs of Civil Rule 5, in an attempt to make clear that the recent amendments to Civil Rule 5, which eliminate the need to file some proofs of service with the Superior Court, do not apply to the appellate courts. These cross-references are merely to provisions specifying the form which a proof of service must take, and stating that the proof, when necessary, is to be filed with the clerk.

Rule 515. Process--How Returnable.

A person serving the process of the appellate courts shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to process. If service is made by a person other than a marshal, his deputy, a state police officer, or other officer of the court so designated, the person making service shall make affidavit thereof. Failure to make proof of service shall not affect the validity of the service.

Rule 515 COMMENT:

Former Rule 40, without substantive change. This rule is required by AS 22.07.100.

Rule 516. Death of a Party.

(a) Substitution. The death of a party in a civil action or proceeding shall not affect any appeal taken or petition for review made, or the right to take an appeal or to seek review, except as limited by paragraph (b) of this rule. The proper representatives of the estate, or in the personalty or realty, of the deceased party, according to the nature of the case, may voluntarily appear and be substituted as parties for the decedent, or substitution may be effected as in the case of death of a party pending an action in the Superior Court. Thereupon proceedings shall be had in the Supreme Court as in other cases.

(b) Time. The times specified in these rules for taking an appeal or petitioning for review, or for taking any of the further steps to secure a review of the judgment appealed from or the order in respect to which review is sought, shall be extended for the time necessary to enable such representatives to be substituted for the deceased party; provided, that such time shall not extend for more than sixty (60) days after the date of death of such party. If substitution is not effected within such period, these rules relating to the time for taking an appeal or petitioning for review, or for taking such further steps to secure review, shall be as fully applicable as in other cases.

Rule 516 COMMENT:

Former Rule 41 without substantive change.

Rule 517. Substitution of Parties and Attorneys.

(a) Parties. Whenever a substitution of parties to a pending appeal is necessary other than by reason of death, it shall be made by proper proceedings instituted for the purpose in the trial court. On proper motion and the filing of a certified copy of the order of substitution made by the trial court, a like order of substitution shall be made in the appellate court.

(b) Attorneys. Withdrawal or substitution of attorneys may be effected by serving and filing a stipulation in the appellate court, signed by the party, the retiring attorney and any substituted attorney. The stipulation is subject to approval of the court. In the absence of stipulation, withdrawal or substitution may be effected only by and order made pursuant to a noticed motion in the appellate court; provided, however, that unless otherwise ordered, service of notice of the motion need be made only on the party and the attorneys affected thereby. A notification of any such withdrawal or substitution shall be given by the clerk of the appellate court to the clerk of the trial court, and substituted counsel shall forthwith give notice thereof to all parties.

Rule 517 COMMENT:

Former Rule 42. Paragraph (b) is revised to make stipulations for withdrawal of counsel subject to court approval. It is anticipated that where new counsel is substituted, approval will be granted routinely by the clerk's office. However, if new counsel is not substituted and the party is left to proceed pro se, judicial inquiry into the party's capacity to proceed pro se and any possible prejudice to the party may be appropriate.

Rule 518. Pro Se Litigants

If a party is appearing in an appeal unrepresented by counsel, all references in these rules to counsel shall be construed as referring to the party personally. All documents filed by such a party shall include an address at which that party can be served.

Rule 518 COMMENT:

New

Rule 519. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the appellate court at any time of its own initiative and after such notice, if any, as the court orders, or on motion of any party and after such notice, if any, as the court orders.

Rule 519 COMMENT:

Former Rule 43 without substantive change.

Rule 520. General Authority of Appellate Courts.

(a) In any matter lawfully brought before it for review, the Supreme Court, upon motion and notice of a party or upon its own motion, may at any time modify or vacate any order made by a trial court or the Court of Appeals in relation to the prosecution of an appeal or a petition for review.

(b) In any matter lawfully brought before it for review, the Court of Appeals may similarly modify or vacate any order made by a trial court in relation to the prosecution of an appeal or petition for review.

(c) The appellate court may affirm, modify, vacate, set aside or reverse any judgment, decree, decision or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order; or require such further proceedings to be had as may be just under the circumstances.

Rule 520 COMMENT:

Former Rule 44, revised to incorporate the Court of Appeals. Former Rule 44(a) spoke only of orders of the Superior Court; the revised version permits either appellate court, in a case pending before it, to modify or vacate

orders entered by either trial court, and further permits the Supreme Court to modify or vacate orders of the Court of Appeals.

The rule is revised to limit the courts' general power to "any matter lawfully brought before it for review," to eliminate any possible implication that this rule confers a sua sponte power of revision on the appellate courts, or that this rule purports to expand the statutory jurisdiction of either court.

Rule 521. Construction

These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the appellate courts where a strict adherence to them will work surprise or injustice.

Rule 521 COMMENT:

Former Rule 46, without substantive change. Carries over the present practice that every provision of the Appellate Rules is subject to waiver when circumstances warrant. This is contrary to FRAP 2 and 26(b), which provide that the federal Courts of Appeals cannot waive certain jurisdictional time periods in their rules.

Rule 522. Legal Effect of Rules--Procedural Portions of Statutes Superseded.

These rules are promulgated pursuant to constitutional authority granting rulemaking power to the Supreme Court, and to the extent that they are inconsistent with any procedural provisions of any statute not enacted for the specific purpose of changing a rule, shall supersede such statute to the extent of such inconsistency.

Rule 522 COMMENT:

Former Rule 50 without substantive change.

Rule 523. Title.

These rules shall be known and cited as the "Rules of Appellate Procedure."

Rule 523 COMMENT:

Former Rule 49 referred to these rules as "Rules of Appellate Procedure of the State of Alaska." This draft shortens the term, comparable to Civil Rule 97 ("Rules of Civil Procedure") and Criminal Rule 58 ("Rules of Criminal Procedure").

PART SIX. SUPERIOR COURT AS AN APPELLATE COURT

Rule 601. Scope of Part Six

(a) Part Six of these Rules (Rules 601 through 611) applies to requests to the Superior Court to review decisions of the District Court or an administrative agency under AS 22.10. 020(a) and AS 22.15.240(a), either by appeal or by petition for review.

(b) On any point not addressed in Part Six, procedure in appeals to the Superior Court shall be governed by the provisions of Parts Two and Five of these Rules, and procedure in petitions for review to the Superior Court shall be governed by the provisions of Part Four of these Rules.

Rule 601 COMMENT:

Part Six of the draft spells out procedure in the Superior Court as an appellate court. All the other appellate rules pertain to appeals to the Supreme Court or Court of Appeals. Part Six replaces former Appellate Rule 45, former District Court Criminal Rules 2, 3 and 7, and former District Court Civil Rules 23 through 31. Those rules are being rescinded.

The intent is to spell out only those procedures in the Superior Court which differ from those in the higher appellate courts. Where procedure is the same, the provisions of Parts Two, Four and Five of these rules are incorporated by reference.

This draft is a complete revision of the former rules, intended to keep this appeal process simpler and less expensive than appealing to the Court of Appeals or to the Supreme Court.

A major change is deletion of the requirement that there be a prehearing conference in every appeal to the Superior Court. In fact, these conferences are not being routinely held; the various Superior Courts have adopted standing orders governing the scheduling of the appeal and addressing all the issues which former Rule 45 contemplated would be resolved at the prehearing conference. Certainly conferences are not necessary in routine small claims, landlord-tenant, OMVI, traffic, Limited Entry, and workers' compensation appeals.

Rule 601 COMMENT continued

Part Six contains the rules contemplated by AS 22.15.240(d), as amended by section 15 of Chapter 12, SLA 1980.

Two matters of terminology: The comments, but not the rules, use the phrase "higher appellate courts" to refer to the Supreme Court and the Court of Appeals. A "civil" case, as used in both the rules and the comments, does not include an appeal from an administrative agency.

Rule 602. Time-Notice-Bonds

(a) When Taken.

(1) The time within which an appeal may be taken to the Superior Court from the District Court shall be 30 days from the entry of the judgment appealed from. The running of the time for appeal shall be as set forth in Rule 204(a).

(2) The time within which an appeal may be taken to the Superior Court from an administrative agency shall be 30 days from the date that the order appealed from is mailed or delivered to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the agency's reconsideration decision.

(b) Notice of Appeal.

(1) The contents of the notice of appeal shall be as set forth in Rule 204(b) and the notice of appeal shall be filed in the Superior Court. The Clerk of the Trial Courts shall forthwith mail or deliver a copy of the notice of appeal to the administrative agency or District Court involved and also notify it that it must prepare the record on appeal in accordance with Rules 210 and 604.

(2) In a criminal appeal, in lieu of written notice, a defendant may give oral notice of appeal to the

Superior Court in open court, immediately following the imposition of sentence, which notice shall be entered by the district judge or magistrate in the docket. When oral notice is given, the defendant shall state to the court the grounds of appeal, each of which the court shall note in the record. Additional grounds of appeal may be set forth by written notice to the court filed within the time allowed for the filing of a written notice of appeal.

(3) The grounds for appeal stated in the notice of appeal shall constitute the sole basis for review by the Superior Court.

(c) Bond on Appeal. In a civil case or an appeal from an administrative agency, unless a party is exempted by law, or has filed an approved supersedeas bond under Rule 603(b), a bond for costs on appeal shall be filed with the notice of appeal. The amount of the bond, if any, shall be fixed by the Superior Court and it shall be regulated by the terms of Rule 204(c) and Civil Rule 80. The bond shall be filed with the Superior Court.

(d) Failure to File or Insufficiency of Bond. If a cost bond on appeal is not filed within the time specified by paragraph (c), application for leave to file any such bond must be made to the Superior Court.

Rule 602 COMMENT:

Paragraph (a) follows former Rule 45(a) without substantive change.

Paragraph (b) is taken from former Rule 45(b) and District Court Criminal Rule 2(a)(2). In a change from present practice, oral notice of appeal is restricted to criminal cases, and would no longer be permitted in civil cases. (Former District Court Civil Rule 23(c)(2), to be deleted.) Eliminating oral notice in civil cases conforms that procedure to administrative appeals. A notice of appeal is much simpler to prepare than an appellant's brief, which will also be required of the appellant, even if appealing pro se. On the other hand, retaining oral notice in misdemeanor criminal cases reduces the possibility that a person unfamiliar with the process will be denied the right to appeal a criminal conviction on a technical ground unrelated to the merits of the case.

Although a criminal litigant in the District Court can elect between an appeal to the Superior Court or one to the Court of Appeals, an oral notice of appeal can be used only to appeal to the Superior Court. A notice of appeal to the Court of Appeals must be in writing and accompanied by a statement of points and designation of record.

Paragraph (b)(3) is former District Court Criminal Rule 2(a)(3) and former District Court Civil Rule 23(c)(3) expanded to cover and administrative appeals.

Paragraph (c) is a revision of former Rule 45(c) and District Court Civil Rule 23(e).

Paragraph (d) is a revision of former District Court Civil Rule 25(a).

Rule 603. Stays

(a) Civil Appeals

(1) Automatic Stay. Except as to judgments entered on default or by consent or on confession, no execution shall issue upon a judgment of the District Court nor shall proceedings be taken for the enforcement of such judgment until the expiration of 2 days after its entry.

(2) Stay Upon Appeal-Supersedeas Bond. When an appeal is taken, the appellant may obtain a stay of proceedings to enforce the judgment by filing a supersedeas bond with the District Court, or with the Superior Court in administrative appeals, not later than 30 days after entry of the judgment or administrative order appealed from. The bond shall be conditioned for the satisfaction in full of any judgment (including interest and costs) which may be given against the appellant by the Superior Court, or for satisfaction in full of the judgment (including interest and costs) of the District Court if the appeal is dismissed. The bond shall comply with the provisions of Civil Rule 80.

(3) Proceedings on Stay. When an appeal is taken, the District Court judge or magistrate shall enter in the docket whether or not the proceedings to enforce a judgment have been stayed. If the proceedings are stayed, and process has been issued to enforce the judgment, the judge or magistrate must recall the same by written notice to the officer holding the process. Thereupon the process must be

returned to the magistrate, and all property seized or levied upon by virtue of such process must be released if it has not been sold, and in cases of civil arrest, the person arrested must be released from custody. This subdivision of this rule shall not be construed as making any stay retroactive or as invalidating any proceedings or levies prior to the time the stay becomes effective.

(b) Criminal Appeals. If a sentence of imprisonment is imposed, admission to bail shall be allowed and the sentence stayed, pending appeal. A sentence to pay a fine or a fine and costs may be stayed, if an appeal is taken, by the District Judge or magistrate or by the Superior Court upon such terms as the court deems proper. During appeal the court may require the defendant to deposit the whole or any part of the fine and costs in the registry of the Superior Court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make an appropriate order to restrain the defendant from dissipating his assets. An order placing the defendant on probation shall be stayed if an appeal is taken.

Rule 603 COMMENT:

Paragraph (a) is taken from District Court Civil Rule 24 without substantive change. After review and possible revision of draft Rules 204(d) and 205, corresponding changes should be made to this rule. See the comment to Rule 205.

Rule 604. Record

(a) Preparation of Record

The record on appeal shall be prepared in conformity with Rule 210, unless otherwise ordered by the Superior Court. The Clerk of the Trial Courts shall prepare the record on appeal in an appeal of District Court judgments. The administrative agency shall prepare the record on appeal in an appeal of an administrative decision. All reasonable costs incurred in connection with preparing the record on appeal shall be borne by the appellant; in the instance of a cross-appeal, the costs may be apportioned. The preparing agency may require in advance the costs as reasonably estimated by the agency.

(b) Time. The time for certification of the record on appeal shall run from service of the notice required by Rule 602(b)(1) on the person who is to prepare the record. If the record is to be prepared by the clerk with whom the notice of appeal was initially filed, the time for certification of the record shall run from the date of filing of the notice of appeal.

(c) Power of Court to Correct or Modify Record of District Court. If any differences arise as to whether the record on appeal truly discloses what occurred in the District Court, the difference shall be submitted to and settled by the Superior Court and the record made to conform to it. If anything material to either party is omitted from the record

on appeal by error or accident or is misstated therein, the parties by stipulation, or the Superior Court on motion or of its own initiative may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the District Court.

Rule 604 COMMENT:

Paragraph (a) is former Rule 45(e).

Paragraph (b) is a revision of a portion of former Rule 45(b).

Paragraph (c) is former District Court Civil Rule 26(c).

The draft rule, like the former rule, is silent on the question of transcript. By its silence, it incorporates the provisions relating to transcript for appeals to the higher appellate courts. In fact, the Superior Court in Anchorage has adopted a policy of not transcribing proceedings in the District Court at public expense without an explicit order from the Superior Court judge hearing the appeal. No such provision is included in the draft because of the difficulties which would be engendered by a rule saying that a transcript which an appellant paid for will not be considered by the court, and the possible constitutional difficulties if the restriction applied only to indigent appellants. See Mayer v. City of Chicago, 404 U.S. 189, 30 L.Ed.2d 373 (1971).

Rule 605. Briefs

Unless the Superior Court orders to the contrary: (1) the time for serving and filing briefs shall be as specified in Rule 212(a)(1); (2) briefs shall be in the form prescribed by Rule 212(b) & (c), and (3) filing of a single copy with proof of service is sufficient, without the necessity of duplication as provided in Rule 212(a)(2) & (3).

Rule 605 COMMENT:

This rule supplants former Rule 45(f) & (g) and a portion of Civil Rule 76(a).

Rule 606. Dismissal if Costs Not Paid.

If the costs for preparation of the record or transcript on appeal are not paid within 30 days of notification that such costs are due, the appeal may be dismissed by the Superior Court on its own motion or on the motion of opposing counsel.

Rule 606 COMMENT:

This is former Rule 45(h). It supplements draft Rule 204(b)(2).

Rule 607. Conflicts with Other Procedures in Administrative Appeal.

These rules shall supersede all other procedural methods specified in Alaska statutes for appeals from administrative agencies to the courts of Alaska.

Rule 607 COMMENT:

Former Rule 45(i) without substantive change.

Rule 608. Sentence Appeal.

A sentence appeal to the Superior Court shall be governed by Rule 215, and that rule shall in case of inconsistency prevail over Part Six of these Rules, except that oral notice of sentence appeal to the Superior Court may be given as provided in Rule 602(b)(2).

Rule 608 COMMENT:

The effect of this rule is to adopt the briefing schedule and contents of record provisions used in sentence appeals to the higher appellate courts, rather than those in draft Rules 604 and 605.

Rule 609. Powers of Superior Court.

After notice of appeal to the Superior Court has been given, the Superior Court shall have power to make such orders as are necessary and proper to aid its appellate jurisdiction. In its discretion the Superior Court may in lieu of an appeal, grant a trial de novo in whole or in part. If such trial de novo is granted, the action shall be considered as having been commenced in that court at the time the record on appeal is filed. All further proceedings in such action shall be governed by the rules governing procedure in the Superior Court, except that no summons nor any amended or additional pleadings shall be served unless authorized or required by the court. The hearing or trial of the action shall be upon the record thus filed and upon such evidence as may be produced in the Superior Court.

Rule 609 COMMENT:

This is a combination of former Rule 45(j) and District Court Civil Rule 29. The provisions relating to trial de novo have been unchanged since 1959. District Court Civil Rule 18 requires a trial de novo in small claims actions if the proceedings in the District Court were not of record.

The discretion of the Superior Court to grant trial de novo in both agency and District Court appeals is found in AS 22.10.020(a), and was not changed by Chapter 12, SLA 1980. (Section 15 of Chapter 12 did delete parallel language, applying only to appeals from the District Court, from AS 22.15.240(c).)

Rule 610. Petitions for Review of Non-Appealable Orders or Decisions

(a) When Available. An aggrieved party, including the State of Alaska, may petition the superior court to review any interlocutory order or decision of a magistrate or district court or of an administrative agency in a proceeding in which the superior court has appellate jurisdiction.

(b) When granted. Review is not a matter of right, but will be granted only when the sound policy behind the general rule of requiring appeals to be taken only from final judgments is outweighed because

(1) postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right or because of unnecessary delay, expense, hardship or other related factors; or

(2) the order or decision involves a controlling question of law on which there is a substantial ground for difference of opinion, and an immediate review of the order may materially advance the termination of the proceeding in the other forum; or

(3) the magistrate or district court so far departed from the accepted and usual course of judicial proceedings, or the administrative agency has so far departed from the accepted and usual course of administrative adjudication, as to call for the superior court's power of supervision and review.

Rule 610 COMMENT:

This rule replaces District Court Criminal Rule 3 and District Court Civil Rule 31. Like them, it provides a unitary procedure for criminal and civil petitions.

Section (a). Dist. Ct. Civ. R. 31(a) has been rephrased to limit review in administrative cases to "proceedings in which the superior court has appellate jurisdiction". See generally AS 22.10.020(a) (limiting superior court's appellate jurisdiction in administrative cases to appeals "provided by law"); AS 44.62.560(a) (limiting appeals under the administrative procedure act to "final administrative order[s]").

Section (b). Dist. Ct. Civ. R. 31(b), which currently governs the granting of review in Superior Court, is the same as Appellate R. 24(a). This revision incorporates the "balancing" approach of draft App. R. 402(b). However, the factors which may tip the balance in favor of review are somewhat different here than in draft App. R. 402(b).

A requirement of a "controlling" question of law is added and the "public interest" aspects of draft App. R. 402(b)(2) and (4) are eliminated. The public interest is not the Superior Court's major area of concern, as it is the Supreme Court's. The Superior Court is, on the other hand, concerned with the expeditious termination of litigation. Thus it seems appropriate to place more emphasis on shortcutting protracted and unnecessary proceedings in inferior tribunals when the Superior Court

is deciding whether or not to grant review. Draft App. R. 610(b) is intended to focus more attention on the practical effects of delayed review than does draft App. R. 402(b) in the belief that the Superior Court's exercise of discretion with respect to granting review should rest on somewhat different grounds than does the Supreme Court's.

Rule 611. Petitions for Review - Procedure.

(a) Filing. A petition for review may be filed with the Clerk of the Superior Court within ten days from the date of the challenged order or decision, along with proof of service on all parties. A judge of the Superior Court, for good cause shown, may extend the time for filing. The party seeking review shall be known as the petitioner. All other parties to the proceeding shall be named as respondents. When the petition arises from an administrative tribunal, a notice of appeal shall be filed with that body. Otherwise, no notice of review is required.

(b) Other Matters.

(1) Cross Petitions and Petitions for Review of Multiple Orders may be filed in accordance with the provisions of Appellate Rule 403(a)(2) and (3).

(2) The Petition or Cross Petition shall conform to Appellate Rule 403(b) through (e), except that the statement of reasons why review should be granted shall be governed by Rule 610.

(c) Consideration by the Court. The court shall determine whether to grant or deny the petition within ten days after the day on which the response is due. The court shall consider the merits of any petition granted as soon as practicable, and unless otherwise ordered, without oral argument, and on the basis of the memoranda and supporting documents submitted by the parties. The court, on request or on its own motion, may require submission of whatever additional portions of the record it considers

necessary, or may order supplementation of the record through oral testimony or otherwise.

(d) Cost Bond. There shall be filed with the petition, or at such other time as the court may allow, a cost bond in an amount to be fixed by the superior court. It shall be conditioned to secure the payment of costs if the petition is denied or if the order or decision sought to be reviewed is affirmed, or such costs as the superior court may award if the order or decision is modified. After a cost bond has been filed, a respondent may by motion raise objections to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the superior court. If a supersedeas bond is filed, no separate cost bond is required.

(e) Stay.

(1) Judicial Proceeding. When a petition for review has been filed, the superior court in its discretion may stay further proceedings by the magistrate or district court and the operation or enforcement of the order or decision sought to be reviewed upon such terms as to bond or otherwise as the court considers proper for the security of the rights of the adverse party.

(2) Administrative Proceeding. When a petition for review has been filed, the superior court may stay further proceedings in an administrative agency and the operation or enforcement of the order or decision sought

to be reviewed when the party seeking review establishes that irreparable injury will result if the stay is not granted.

(f) Relief Available. Upon consideration of a petition for review, the Superior Court may affirm, modify, vacate, set aside or reverse any order or decision of a magistrate court or district court, and may remand the action or proceeding and direct the entry of such appropriate judgment or order, or require such further proceedings to be had, as may be just under the circumstances.

Rule 611 COMMENT

Section (a). Time for filing is currently governed by Dist. Ct. Civ. R. 31(e). The revision keeps the 10-day limit and omits the provision limiting extension of that time. See Civil Rule 94; draft App. R. 403(a)(1). The new rule also requires the petitioner to notify an administrative agency, but not an inferior court, if a petition is filed. Given the independent status of those bodies, this provision is appropriate.

Section (b). This may be superfluous, given Rule 601(b), but has been put in to avoid confusion, particularly since prior practice has been somewhat changed here. Compare Dist. Ct. Civ. R. 31.

Section (c). Since matters at the district court or magistrate level should move speedily, hastening the turnaround time on petitions for review in the Superior Court should be of overall value. Hence the judge is required to decide within ten days whether to grant the petition.

The explicit provisions of Dist. Ct. Civ. R. 31(d) for for obtaining the record from an inferior court have been omitted They seem superfluous in the case of petitions from courts of

record, although they may have some value in petitions from a magistrate court or an administrative agency. The provision for supplementing the record conforms to the superior court's appellate authority, which can be de novo whether the proceeding below is judicial or administrative. See AS 22.10.020(a); AS 44.62.570(d).

Section (d). This is Dist. Ct. Civ. R. 31(c)(2). Compare Rev. App. R. 403(f), allowing the bond only after the review is granted. The requirement of a bond hopefully will prevent district court litigants from cluttering up the superior court with unnecessary petitions in cases of insubstantial monetary value.

Section (e). This is Dist. Ct. Civ. R. 31(d)(3), insofar as it applies to stays of judicial proceedings or orders. Compare Civil Rule 62(d) and (e); App. R. 8; Rev. App. R. 405(b).

For the stay of administrative proceedings and orders, however, the Supreme Court has generally utilized a quasi-injunctive standard. See Keystone Services, Inc. v. Alaska Transportation Comm'n, 568 P.2d 952 (Alaska 1976); A.J. Industries, Inc. v. Alaska Public Services Comm'n, 470 P.2d 537, 539 (Alaska 1970); Johns v. State, Department of Highways, 431 P.2d 138 (Alaska 1967). Given the limited degree of interference in the administrative process which is appropriate, particularly at the interlocutory stage, that de facto standard has been made explicit. Cf. AS 44.62.560(e).

Section (f). This is Dist. Ct. Civ. R. 31(h). As currently written, Dist. Ct. Civ. R. 31(a) includes an "all writs" provision, similar to that in App. R. 23 and 25(a). This revision eliminates that provision, as do Rev. App. R. 402 and 404, but it omits any complementary procedural directive as to how such relief may be obtained in the superior court, unlike Rev. App. R. 405. Among the writs mentioned in Dist. Ct. Civ. R. 31(a) are writs of review and certiorari; but these are surely nothing other than petitions for review. Also mentioned are writs of mandamus, which the supreme court has elsewhere declared abolished. See Civil Rule 91(b).

There is some question under the current rules as to whether or not a party may seek such common law writs in the supreme court without a prior application in the superior court. Compare Hotel, Restaurant, Etc. v. Local No. 879 v. Thomas, 551 P.2d 942 (Alaska 1976), with State v. Clayton, 584 P.2d 1111 (Alaska 1978); See App. R. 25. Leaving the provision for "all writs" in Dist. Ct. Civ. R. 31 leaves in limbo those cases where no superior court petition for review is available, since there is not provision for original applications for relief in the superior court. Therefore a separate rule regarding the procedure for obtaining common law writs from the Superior Court would be appropriate. To the extent that the writs issue out of the non-appellate jurisdiction of the superior court, the procedure should be

in the Civil Rules, not here. Given the Superior Court's broad equitable injunctive powers, positive and negative, there is little reason to believe that existing procedures should be supplemented in this respect.